

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21-CRB-0001-PR
(2023-2027)

**WRITTEN DIRECT STATEMENT
OF COPYRIGHT OWNERS**

VOLUME III

PUBLIC VERSION

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WITNESS STATEMENT OF JW BEEKMAN

1. My name is JW Beekman and I am the Global Chief Financial Officer of Universal Music Publishing Group (“UMPG”).

2. As I will explain below, music publishers are instrumental in discovering and nurturing songwriters and composers through financial investment in new writers, many of whom will not be commercially successful. Music publishers, and in particular, the larger music publishers with catalogues of successful music, are able to make this financial investment in future songwriters because of the income generated by their existing catalogues of songs. At the same time, at least in the United States, in part because of the copyright recapture rights provided in Sections 203 and 304 of the Copyright Act and in part simply because many songwriter agreements last only for a limited number of years, in order to retain United States rights in existing catalogues or to acquire rights in catalogues of songs that were previously controlled by other publishers, music publishers also have to make very significant additional financial investments in those catalogues. Both of these types of investments are necessary to support the creation of the great music yet to be written.

3. The Copyright Act provides copyright owners and administrators with separate and divisible rights that are capable of being individually exploited and monetized. Some of those rights, such as synchronization rights, are licensed on a consensual basis and operate in an open and free market. Others, in particular mechanical rights and public performance rights, which are the two largest sources of songwriter and music publisher income, are, respectively, subject to compulsory licensing requirements (in the case of mechanical rights) and to rate court determinations (with respect to performance rights pursuant to consent decrees applicable to the two major Performing Rights Organizations). Under both of these regimes, there is not a free and open market negotiation over rates.

4. In the course of the last few years, how music is enjoyed by consumers has dramatically changed, moving from an ownership model, i.e. consumers bought LPs/CDs and more recently MP3 downloads, which had endured for over a century, to an access model, whereby consumers have access to virtually all music through various DSP platforms. As a consequence of that rapid change, the sources of mechanical income for music publishers and songwriters have become more and more concentrated in interactive audio streaming (which also involves performance rights). More recently, there has been a proliferation of interactive audio/visual streaming platforms (including YouTube and other new short form video platforms, which require both performance rights licenses and reproduction rights licenses authorizing the interactive streaming of audio/visual uses of musical compositions), and these platforms are becoming an increasingly important source of income for songwriters and publishers, which I will document below based on UMPG's financial records for the period from 2016 through 2020. Unlike the interactive audio streaming services, whose rates and terms are determined in these proceedings

before the Copyright Royalty Board, the licensing of musical compositions by these audio/visual platforms is not subject to compulsory licensing restrictions but are negotiated in the open market.

5. As the physical recording and digital download markets continue to rapidly erode, interactive audio streaming has become the primary source of mechanical income. As I will also show below, UMPG's financial records confirm this trend. As such, because one of the prongs for the determination of royalties is a percentage of the digital service provider's revenue, publishers and songwriters have become focused on trying to assure that this source of income is not suppressed by business decisions and strategies beyond our control. The argument that I understand has been made by the digital service provider participants in this proceeding (the "Services") is that all of their various discounts and family and student plans are designed to attract new subscribers or consumers who supposedly have a lower willingness to pay and will increase future revenues and hence future royalties (under a revenue-based royalty system). I am aware, from our reports from the MLC, that the discounting by the Services has driven the Services' ARPU sharply below the headline subscription rate, reducing the value of royalties determined under a percent of revenue prong on a current basis. Even assuming that current discounting could be shown to result in higher future royalties (putting to the side whether the royalties are less than they should be absent all of the discounting), that is cold comfort to those current songwriters receiving lower royalties now due to the business strategies of the Services.

6. In addition to investing to identify and help develop new songwriters, UMPG also provides financial support both to new and existing songwriters by paying advances against royalties to be earned in the future. The ability to make these advances, especially to new and unproven writers, is not based on any income stream that exists for their as yet unwritten songs but is instead funded by the income generated by music publishers' existing catalogues. The songwriters' share

of mechanical income, synchronization income, and blanket reproduction income (along with the co-publishers' share of performance income) are the primary sources of recoupment of advances. Because the songwriters' share of performance income is usually paid directly to songwriters by their PRO (primarily ASCAP and BMI), the only part of performance income that is available for recoupment of advances made by UMPG is the co-publishers' share that writers retain under our agreements (which is typically paid to UMPG, as the administering publisher, for payment to the writer/co-publishers). This too is part of the reason why music publishers and writers are focused on protecting, indeed, enhancing, the income received from interactive audio streaming services, as it has become one of the primary sources of recoupment of advances.

7. In addition to identifying and supporting new and existing writers, music publishers also market, promote, and arrange for the worldwide registration and licensing of the songs they own and/or administer and are responsible for the collection of royalties for the songs they control. Even with the advent of the MLC and the blanket license of mechanical rights under Section 115 of the Copyright Act, the very large catalogues controlled by major publishers facilitate direct licensing by aggregating works available for licensing and minimizing the need for licensees to pursue dozens or even hundreds of direct licensing sources. This reduces the friction and transactional cost of licensing by licensees. Music publishers also track the usage of the songs, collect and process all of the income received from tens of thousands of users and issue royalty statements and payments to the writers and composers (and their heirs). UMPG was the first music publisher with an in-house team focused on ensuring accurate identification and claiming of our songwriters' works on streaming audio/visual platforms such as YouTube.

8. Music publishers also undertake to protect the copyrights of the musical works they own or control against unauthorized use, through in-house and outside litigation counsel and

through their support and affiliation with various music publisher associations globally (such as the National Music Publishers' Association in the United States).

9. In short, music publishers perform a variety of global administration and licensing functions that cannot economically be performed by individual songwriters and which enable the licensing market to function with far less friction and less cost than licensees would otherwise occur.

10. I submit this statement to detail UMPG's financial investment in: (i) finding new songwriters and supporting existing songwriters; (ii) marketing, promoting and licensing songs both in the United States and on a worldwide basis; (iii) monitoring the exploitation of the songs in our catalogue and collecting and processing the income paid by tens of thousands of users and then providing our songwriters and co-publishers with accurate accountings and payments of income generated by their songs; and (iv) protecting the copyrights against unauthorized use. In addition, as I indicated above, I will provide a detailed analysis of the income received by UMPG over the period from 2016 through 2020 (obviously, we have not yet completed 2021), much of which is payable to writers and co-publishers, from the various forms of exploitation of music. As I have said and will show below, the streams of income being earned by songwriters and publishers have dramatically changed as the former ownership model of music delivery has increasingly been replaced by an access model.

PROFESSIONAL BACKGROUND

11. I received a Master of Arts in Business Economics from Vrije Universiteit Amsterdam, in the Netherlands in 1996. I was employed as a Director of Finance & Administration at BMG Music Publishing and before that was a management consultant at PricewaterhouseCoopers. I joined UMPG in 2007, initially in the Netherlands. In 2008 I was asked to move to the United

States and served as Vice President, U.S. Finance and thereafter as Senior Vice President, North American Finance for UMPG. On May 1, 2017, I became Global Chief Financial Officer of UMPG.

12. As CFO, I work closely with Jody Gerson, the Chief Executive Officer of UMPG and Marc Cimino, UMPG's Chief Operating Officer to create and then execute UMPG's global business strategies and activities. I also advise divisional Presidents and Managing Directors, working with them to develop their financial plans and oversee UMPG's Global Technology Department, which develops and maintains an elaborate suite of applications to facilitate the administration of the songs in UMPG's entire catalog. However, my primary function is to manage UMPG's global finance organization, monitoring financial performance, planning, budgeting, target setting, investment activities and infrastructure of over 40+ separate reporting territories globally.

UMPG

13. UMPG is one of the largest music publishing companies in the world, owning and/or administering many of the most valuable songs written by some of the most revered songwriters in history. Our catalogue covers virtually every musical genre and extends over decades of songwriting, including songs by ABBA, Adele, Alicia Keys, The Beach Boys, Beastie Boys, Irving Berlin, Leonard Bernstein, Justin Bieber, Mariah Carey, Coldplay, Elvis Costello, Neil Diamond, Drake, Bob Dylan, Billie Eilish, Eminem, Gloria and Emilio Estefan, Ariana Grande, Al Green, Jimi Hendrix, Billy Joel, Elton John & Bernie Taupin, Joe and Nick Jonas, The Mamas and The Papas, Kendrick Lamar, Lil Baby, Pearl Jam, Maroon 5, Mumford & Sons, Post Malone, Randy Newman, Ne-Yo, Steve Perry, Otis Redding, R.E.M., Stax (East Memphis Music), Taylor Swift, Justin Timberlake, U2, Keith Urban, Andrew Lloyd Webber, and many others. UMPG also is a leading publisher of

Classical and Christian/Gospel music and Production music (songs and recordings specifically created for background use in commercials, television and film).

14. At the time of the last proceeding, *Phonorecords III*, UMPG's catalogue consisted of some [REDACTED]

15. UMPG's catalogue has grown because our existing writers have continued to create new songs, we have signed writers and partners who previously had other publishing arrangements, we have acquired new catalogues (such as the extraordinary Bob Dylan catalogue) and we have made significant investments in discovering and developing new songwriting talent to produce new music for the public. None of this occurs without UMPG's financial investment in the systems and people necessary to do the hard work in discovering talent, nurturing that talent, promoting and exploiting the songs created by that talent, and monitoring the exploitation and collecting and distributing the income earned by the songs.

16. UMPG's employees in our Creative/Artists and Repertoire ("A&R") Department undertake the task of discovering and helping to develop the songwriters of the future. UMPG employs approximately [REDACTED] in the United States alone and [REDACTED] worldwide (including Managing Directors), who are dedicated to discovering and developing fresh and diverse songwriting talent.

17. UMPG's A&R Department, which plays a key role in assuring the continuing creation of new music for the public, represents a significant portion of UMPG's overhead costs, which are discussed in detail below. But it is not merely the overhead costs associated with the maintenance of our A&R Department. The A&R Department has to interface and work with our business and legal affairs department and UMPG bears the costs necessary to operate and staff its business and legal affairs department. Its employees (including lawyers) in that department negotiate and draft

agreements with new writers (as well as extending existing agreements or acquiring catalogues of songs from writers or their heirs).

18. In addition, as I will discuss more fully below, in order to secure rights in the future songs to be written by a new writer or to extend agreements with existing writers, [REDACTED]

[REDACTED]

[REDACTED]

19. With proven writers, UMPG's financial analysis includes examining, among other things, the prior earnings of the writer's songs (which, given structural changes in the music industry, discussed below, is no longer always an effective predictor of future income, either for existing songs or for those to be written in the future). With new writers who have not yet achieved commercial success, determining what sort of an advance should be paid is even more uncertain and subjective and hence is a risky investment. Our assessment often looks at such factors as the genre of music in which the writer works, whether there is competition for the writer with other music publishers, and the general instincts and experience of our A&R Department, including their assessment of the potential for artistic collaborations.

20. Our financial outlays for advances carry significant economic risk for UMPG with respect to both established and new writers. As I will address more fully below in my discussion regarding UMPG's income from 2016 through 2020, as some of our past sources of income have diminished and as interactive streaming has come to dominate the consumption of music (including in both audio-only format and audio/visual format), increasingly, music has become a "hit" singles business, not only for current music (both popular music and hip hop music) but also for catalogue. The focus on hit singles has made it more difficult, even with proven writers, to use their past income as a predictor of the future.

21. Moreover, the disaggregation of albums (accelerating and compounding the trend that began with the digital download market) means that to generate mechanical, reproduction and performance income, our writers have to have written the singles that are released; merely having a song or songs included on an album, when singles, much more so than albums, are being streamed, will not provide the mechanical income that previously was provided by album sales for all tracks on an album. Thus, the financial risks that must be assumed by UMPG to find and develop the writers of the future as well as to extend agreements with existing writers, even writers who have been successful in the past, have actually increased even as overall publishing income has grown.

22. Despite the efforts of UMPG's experienced A&R and finance personnel to predict success, in the end, [REDACTED]. [REDACTED]. Indeed, only a relatively small percentage of unproven songwriters signed to publishing contracts have their songs recorded and become successful and even among the established writers, as I have said, the ability to accurately predict future income has become more complicated and economically risky.

23. UMPG's payment of advances is nevertheless crucial to the signing and development of songwriters. These advances constitute a substantial yearly cash outlay by UMPG. In 2016, in the United States alone, UMPG began the year with an [REDACTED]. [REDACTED]. [REDACTED]. During the 2016 calendar year, UMPG paid out [REDACTED]. [REDACTED] (the recoupment not necessarily being linked to current year advances). [REDACTED]. [REDACTED].

[REDACTED]

[REDACTED]. As a result, the ending balance of outstanding unrecouped [REDACTED]

[REDACTED]. Attached hereto as **COEX-1.1**, which is taken from our financial records, is a schedule reflecting the total advances paid and recouped by UMPG during the period from 2016 through 2020.

24. Based on UMPG's revenue during the period 2016 through 2020, UMPG has spent an average of [REDACTED]

[REDACTED] I want to note that these advances are paid out of the share of revenue which UMPG retains, either as its net publisher share or as recoupment against previously paid advances, not the gross revenue, most of which, as I will document below, is paid or credited to songwriters.¹

25. To continue this process of using UMPG's NPS (defined in footnote 1) earned today from our current catalogue to support the search for, and payment of advances to, the writers of tomorrow as well as to current and established writers, it is imperative that UMPG receive sufficient revenues from its current primary sources of income, which include interactive audio streaming services, interactive audio/visual streaming services, non-interactive streaming services and other streaming services and platforms. To the extent that the income we receive from these primary sources fails to increase, it will constrict our ability to finance the search for and signing

¹ As I believe the Judges already know, out of the revenues that publishers receive, they have royalty obligations to writers and co-publishers. What remains after the payment to those who share in the revenue we receive is our net publisher share ("NPS"). It is out of that NPS, plus our recoupment of advances, that UMPG and other publishers fund all of the administrative services they perform and all of the advances and writer support provided. The write offs we take on unrecouped advances comes out of our NPS. [REDACTED]

of the songwriters of the future (and also limit our ability to pay advances to established writers whose existing works provide the revenue from which we finance advances and all of our administrative services on behalf of writers). If economic constraints limit UMPG to signing fewer songwriters, the odds of success are reduced, and if we are limited in what we can pay to extend agreements with successful writers or purchase existing catalogues, that too will impact the revenue we will generate in the future to continue to finance the search for the great songs yet to be written.

26. The music publishing industry is incredibly competitive, not only between existing music publishers but more recently with entities such as Primary Wave, Spirit, and Downtown, which are supported by private equity money, as well as Hipgnosis and Round Hill, which have had their funds listed on the London Stock Exchange. While some of these private equity or investor-backed entities (such as Round Hill, Downtown and Spirit) do function as full-service publishing companies, others (such as Primary Wave and Hipgnosis) do not. Those that do not function as a real publisher do not search for, sign and invest in unknown writers. Instead, they purchase existing catalogues or acquire rights to established writers as a purely financial investment. So the economic risks they are taking are far more limited and their NPS is not used to search for or financially support the writers of tomorrow.

27. In addition, the entities that are not real publishers but simply investment vehicles (like Primary Wave and Hipgnosis) often also do not incur the costs of performing any of the development, licensing, administration or royalty accounting functions performed by actual music publishers. Instead, they contract with existing music publishers to perform these administration services. In part because they therefore do not have the overhead costs and investment need of a music publishing business and are not taking the risks associated with signing unproven

songwriters (and in part due to current interest rates being historically low), they have been able to drive up the multiples paid for existing catalogues well beyond historical multiples. But these entities are not, in my view, supportive of the continued creation of new music by new songwriters.

28. UMPG's Business and Legal Affairs Department interfaces closely with our A&R Department (as well as with our outside lawyers and other departments within UMPG, including Finance and our Digital Rights Department) to negotiate and draft agreements and protect our copyrights. The attorneys in our Business and Legal Affairs Department negotiate and draft agreements to acquire catalogues of songs from established songwriters and other publishers and to purchase extended renewal term rights, which are rights arising under the Copyright Act enabling writers and their heirs to recapture rights they have previously granted. The Business and Legal Affairs Department [REDACTED]

29. The costs associated with all of these activities fall within the overhead costs of the A&R, Finance and Business and Legal Affairs Departments. [REDACTED]
[REDACTED]. In 2020, the overhead expenses [REDACTED]. In 2016, the overhead expenses for the Business and Legal Affairs Department in the United States [REDACTED]
These expenditures are reflected on **COEX-1.2** which I have extracted from the financial information we have produced in this proceeding.

30. In addition, UMPG also has a Marketing Department dedicated to marketing the songs within our catalogue and promoting our songwriters. [REDACTED]
[REDACTED]
[REDACTED]

31. In addition to its A&R Department, Business and Legal Affairs and Marketing Departments, UMPG has been required to make significant investments in technology, including in music rights management and royalty accounting systems. The licensing and exploitation of songs is a worldwide business and UMPG receives payments and statements, mostly now electronically, from literally tens of thousands of sources multiple times a year. The data has to be collected and processed and then royalty statements generated and payments made to our tens of thousands of writers or their heirs or to co-publishers, usually twice a year.

32. It is not only technology costs that UMPG has incurred and continues to incur, but UMPG also employs a large number of employees in our Royalty Department who are engaged in receiving and processing royalty statements from our licensees and then assuring that the royalty statements and payments are properly processed and paid.

33. The royalty accounting function is one of the most important services provided by UMPG (and by any music publisher). These royalty accounting services are administered by UMPG's Royalty, Copyright and Income Tracking Departments. In the United States, UMPG employs [REDACTED]. UMPG also employs [REDACTED]. [REDACTED]. These departments work together to assure not only that the compositions we own and/or administer are properly protected and registered with societies around the world (and with the PROs in the United States), but they also monitor the use and exploitation of the compositions, making sure that uses are licensed and that those exploiting the compositions properly report on their use of the compositions.

34. While UMPG has invested heavily in technology with respect to its rights management and royalty accounting systems, the processing of royalties is not simply a

computerized activity. The first step in the process is to ensure proper registration of our interest in songs with Digital Service Providers, Collective Management Organizations and other licensees of our repertoire. The royalty statements and payments we receive have to be reviewed and, invariably, there can be mismatches or failures to match that need to be reconciled so that the statements and payments on songs are linked to the proper writers. And while most of our reports are now electronic, there continue to be statements and payments that come in paper form and have to be coded and manually reconciled by our employees.

35. Further, with tens of thousands of writers and their heirs, the employees of the Royalty Department handle a significant volume of inquiries and communications regarding royalty statements. Audits are also regularly conducted on behalf of writers, and the employees of the Royalty Department also address the audit inquiries, provide responses to audit reports and participate in the resolution of any audit disputes.

36. Another central function of publishers like UMPG is the administration and licensing of rights in the songs in their catalogues. UMPG licenses mechanical rights, reproduction rights, synchronization rights, performance rights, and print rights. In the United States, UMPG licenses mechanical rights to users directly and, since the commencement of the operation of the MLC, through the MLC.

37. While most performance licenses are issued by the PROs in the United States (and through foreign societies in other countries), UMPG also directly licenses some “small” public performance rights in the United States (as well as in other territories) and under the consent decrees governing ASCAP and BMI, publishers must have the right to directly license performance rights. The licensing activities of UMPG comprise a large portion of the day-to-day

activities of UMPG's Business and Legal Affairs Department, Digital Rights Services Department and its Copyright and Film & Television Departments.

38. While UMPG's Film & Television Department markets and licenses our songs, on an individual basis, to film and television production companies, commercial advertisers, and video game companies, as shown by our financials, the major growth in audio/visual uses of UMPG's catalogue has come from the arm's length blanket licensing of our catalogue to audio/visual services. Just like interactive audio streaming services license our songs on a blanket basis, our Digital Licensing Department handles these licenses to audio/visual services in conjunction with our Business and Legal Affairs Department.

39. UMPG's Film & Television Department employs [REDACTED]
[REDACTED] In 2016, the Film & Television Department's overhead expenses in the United States [REDACTED]
[REDACTED] (all as reflected on COEX-1.2 reflecting UMPG's overall overhead expenses year by year).

40. I believe it is important to emphasize that the costs and investment necessary to perform all of the administrative services UMPG and other publishers provide on behalf of their songwriters could not reasonably be undertaken by any individual songwriters. It is the aggregation of hundreds of thousands of songs – and in the case of UMPG, millions of songs – that enables music publishers like UMPG to generate the NPS necessary to defray the costs of providing all of the administration services I have described and to also invest the necessary monies to discover and develop new songwriting talent. It is also that aggregation of songs by music publishers that enables those platforms requiring blanket licenses – other than those now licensed under Section 115 through the MLC – to effectively operate (and that has enabled

interactive audio streaming services to make direct deals that provide access to millions of songs in one agreement, reducing their friction and transactional costs in doing so).

41. In addition, in the past and now in connection with this proceeding, UMPG, as a member of the NMPA, has invested (and will continue to invest) a great deal of money to help defray the costs of these very expensive *Phonorecords* proceedings as well as the appeal and the pending remand proceeding currently before the Judges. UMPG and other publishers absorb these expenses out of their own NPS in effort to protect and enhance the income to be generated for writers and publishers now and in the future.

42. In addition to the foregoing departments, UMPG also incurs additional costs in connection with the day-to-day administration of its catalogue of songs, including UMPG's Finance Department, which as mentioned above, provides the financial input with respect to new writer deals, the acquisition of existing catalogues and the purchase of writer royalty streams and extended renewal term rights. The Finance Department also manages the overall financial affairs of UMPG. The United States Finance Department overhead expenses [REDACTED] [REDACTED] due to a transfer and change of personnel. (See COEX-1.2.)

UMPG'S REVENUES FROM MUSIC PUBLISHING

43. In the current music publishing business, the three primary income streams are from mechanical rights, public performing rights and reproduction or synchronization rights and each of these are themselves subdivided. Attached hereto as COEX-1.3 is a schedule of UMPG's

domestic revenues for fiscal years 2016 through 2020, as well as, for purposes of comparison, UMPG's revenues in the pre-streaming period of 2009 and 2010.²

44. Public performance income, which as I mentioned, is largely licensed through the PROs (primarily ASCAP and BMI), is generated by the performance of musical compositions on terrestrial radio, in bars and restaurants, on non-interactive audio and audio/visual streaming services and on interactive audio and audio/visual streaming services. Before the advent and then the growth of interactive audio streaming, mechanical income historically came primarily from the sale of physical recordings and digital downloads. In recent years, mechanical income has increasingly come from interactive audio streaming services, which have substituted for and, thus far incompletely, replaced mechanical income that previously was provided from the sale of physical recordings and digital downloads and that is confirmed by **COEX-1.3**.

45. To assist the Judges, I will first explain **COEX-1.3** and will then provide an analysis of the information set forth in the schedule. The top section of this Exhibit (lines 4 through 7), reflects the gross domestic revenue received by UMPG from digital streaming, including mechanical income, performance income and reproduction income from interactive audio streaming, interactive audio/visual streaming and non-interactive streaming from 2016 through December 31, 2020. To the left side of the Exhibit is the data for 2009 and 2010 (which reflects no streaming income).³

² I have selected 2009 and 2010 simply because they preceded the *Phonorecords II* proceeding, were before Spotify entered the United States streaming market (while Rhapsody and other players existed, the streaming market was economically insignificant). In addition, the digital download market had matured (the iTunes Store opened in or about 2003) and, as a result, combined with ongoing litigation efforts by both publishers and labels, the impact of piracy had diminished.

³ Interactive audio streaming was an economically inconsequential part of our business in 2009. In addition, [REDACTED]

46. Beneath the section showing the domestic digital streaming income (lines 8 through 15), **COEX-1.3** presents UMPG's gross domestic revenues from other sources of income in 2009, 2010 and 2016 through December 2020. This includes domestic revenue from digital downloads, performance income, mechanical income from physical recordings, synch income, print income and other income. This, combined with the digital streaming income reflected in the top section of the Exhibit (from 2016 through 2020), sums up to the gross domestic revenues of UMPG in each of the years on the schedule (line 16).

47. Beneath the top sections of **COEX-1.3** reflecting UMPG's gross domestic revenues, is a section reflecting UMPG's NPS for each of the different categories of income shown on the schedule (lines 19 through 31). As I will explain below, the NPS calculations in this section do not include a very significant component of songwriter income: the songwriter share of performance income which, as I stated above, is paid directly to writers by the PROs. Instead, in this section, UMPG's NPS is calculated solely based on the revenue received by UMPG, less the royalty payments UMPG makes from the income it receives.

48. Beneath the UMPG NPS section of the Exhibit (lines 34 through 37), is a breakdown of UMPG's gross domestic revenue from digital streaming between interactive audio streaming (which is the income derived from the types of services involved in this proceeding) and both non-interactive streaming services and interactive audio/visual streaming services.⁴ And

While I believe that this income, received in those years, should be counted in those years, I will also analyze our revenues below without considering this income.

⁴

beneath that section of the Exhibit (lines 39 through 41) is an estimated split of the performance income between interactive audio streaming performance income and non-interactive streaming and audio visual streaming.⁵

49. Finally, beneath the breakdown of UMPG's gross domestic revenue from streaming (lines 43 through 45), I have summed up the publisher share of interactive audio streaming from both mechanical income and performance income and then added what I reasonably believe is the writer share of performance income from interactive audio streaming (which, as I have said, is equal to the publisher share of performance income) to arrive at what I believe is approximately the total domestic interactive audio streaming revenue received by UMPG and its writers in each year from 2016 through December 31, 2020.

50. Finally, the next section of **COEX-1.3** (lines 47 and 48) reflects UMPG's NPS in both dollar value and in percentages relative to the total dollar value of the domestic interactive audio streaming income paid to UMPG and its writers (inclusive of the estimated songwriter share of performance income). In other words, this shows what percent and what amount of each dollar of domestic interactive audio streaming revenue paid for UMPG's songs is received and retained by UMPG. As shown therein, when one includes what I believe is the songwriter share of performance income (essentially equal to the publisher share of performance income), which is paid to songwriters directly, [REDACTED]

[REDACTED]

[REDACTED]

⁵ Since songwriter performance income and publisher performance income paid by the PROs are roughly equal, I have been able to approximate what I believe is the songwriter share of interactive audio streaming performance income.

51. I am aware that the Services, and one of their several lobbying organizations, the Digital Media Association, have publicly tried to drive a wedge between publishers and writers by arguing that the reason writers' interactive audio streaming income has been inadequate (as the Judges found in *Phonorecords III*) is because publishers are supposedly getting and keeping too much of the royalty income paid by the Services. UMPG's NPS data shown in **COEX-1.3** clearly counters these assertions by the Services. In simple terms, our writers, who also generally retain a co-publisher's interest (and sometimes a full publisher's interest with UMPG serving as an administrator), [REDACTED] of interactive audio streaming income paid for the licensing of musical compositions. Out of the [REDACTED] of interactive audio streaming income that UMPG receives and retains (and obviously from our NPS from other income streams as well as from the recoupment of advances), UMPG pays for and performs all of the services I have described above and financially supports the continued creation of new music through its search for new writers and its payment of advances to new and existing writers.

52. In contrast, whatever may be their ultimate share of revenue, and putting to the side the economic benefits that accrue to their ecosystems from music, the streaming services do not provide and pay for the administration services provided by music publishers. They do not pay the costs necessary to search for and develop new songwriters. They do not provide financial advances to support writers so that they can create new music. That is undertaken solely by publishers, the costs of which, insofar as interactive audio streaming income is concerned, are defrayed out of the [REDACTED] that constitutes our domestic NPS from interactive audio streaming.

**THE GROWTH IN INTERACTIVE AUDIO STREAMING HAS RESULTED IN THE
DRAMATIC REDUCTION IN MECHANICAL INCOME FROM THE SALE OF
PHYSICAL RECORDINGS AND DIGITAL DOWNLOADS**

53. COEX-1.3 also confirms what I have said above regarding the dramatic changes in the sources of UMPG's revenue as the access model, exemplified by interactive streaming, both audio-only and audio/visual, has replaced the ownership model of consumers buying physical recordings and downloading music. UMPG's and its writers' domestic mechanical income from physical recordings [REDACTED] [REDACTED] (an amount that is [REDACTED] and its writers' mechanical income from the sale of physical recordings in 2009). Even if one chose to pretend that the mechanical income UMPG received from the [REDACTED] [REDACTED] [REDACTED], from the sale of physical recordings in 2009).

54. Similarly, UMPG's domestic mechanical income from digital downloads [REDACTED] [REDACTED] of UMPG's and its writers' mechanical income from digital downloads in 2009). Thus, in total, UMPG's mechanical income from physical recordings and digital downloads [REDACTED] of UMPG's and its writers' mechanical income from the sale of physical recording and digital downloads in 2009). Again, even if one [REDACTED] [REDACTED]

[REDACTED] of UMPG and its writers' mechanical income in 2009 [REDACTED].

55. There is no disagreement that UMPG's domestic mechanical income from interactive audio streaming grew between 2016 and 2020. As shown on line 35 of **COEX-1.3**, UMPG and its writers received [REDACTED] in gross domestic mechanical income in 2016 from interactive audio streaming. By 2020, this source of mechanical income [REDACTED] [REDACTED]. However, even with this [REDACTED], the total interactive audio streaming mechanical income in 2020 was still [REDACTED] of UMPG's and its writers' mechanical income in 2009 from physical recordings and digital downloads – and only [REDACTED] [REDACTED] in 2009 (and UMPG had far fewer songs and far fewer songwriters in 2009 than in 2020).⁶

56. Further, even if one adds the mechanical income UMPG and its writers received from the sale of physical records and digital downloads in 2020 [REDACTED] [REDACTED] that UMPG and its writers received in 2020 from interactive audio streaming, UMPG's and its writers' total domestic mechanical revenue in 2020 was still almost [REDACTED] [REDACTED].

57. But it is not merely that the mechanical income UMPG and its writers received in 2009 [REDACTED] [REDACTED] the mechanical income that UMPG and its writers received in 2009

[REDACTED]

from the sale of physical records and digital downloads [REDACTED]
[REDACTED] paid by the interactive audio streaming services to UMPG and its writers in every year from 2016 through 2020.

58. When one adds the total domestic performance income from interactive audio streaming, inclusive of the songwriter share of performance income, to the total domestic mechanical income generated by interactive audio streaming, as shown on **COEX-1.3** (line 45), the total interactive audio streaming income of UMPG and its writers in 2016 was [REDACTED]
[REDACTED] that UMPG and its writers earned in 2009 from physical recordings and digital downloads including the pending and unmatched mechanical income.

59. Similarly, as also shown on line 45 of **COEX-1.3**, in 2020, the total mechanical and performance income (including the songwriter share of performance income) from interactive audio streaming amounted to [REDACTED]
[REDACTED] received by UMPG and its writers from the sale of physical recordings and digital downloads in 2009. And, again, UMPG's catalogue has nearly doubled during this 11-year period of time.

60. **COEX-1.3** also reveals other trends that confirm what I have said above: while UMPG's domestic income and that of its songwriters from interactive audio streaming has grown since 2016, interactive audio streaming has not promoted other forms of income. As I have shown above, as UMPG's and its writers' income from interactive audio streaming has grown year by year from 2016 through 2020, its mechanical income and that of its writers from physical recordings and digital downloads [REDACTED]
[REDACTED]

61. Similarly, as **COEX-1.3** also reflects, during the 11-year period of time from 2009 through 2020, UMPG's domestic print income [REDACTED] [REDACTED] UMPG's other income [REDACTED]. UMPG's synch income has increased and decreased, year to year, as its catalogue has grown, largely dependent on specific licenses for specific songs issued in any particular year. UMPG's performance income has grown along with its catalogue.

62. Not only has the total income from interactive audio streaming – meaning inclusive of mechanical income and both publisher and writer share of performance income – [REDACTED] [REDACTED] from the sale of physical recordings and digital downloads in 2009, the average income of our writers from interactive audio streaming reflects just how inadequate the royalties have been and continue to be. This is confirmed by **COEX-1.3** and **COEX-1.4**. **COEX-1.4** shows, year by year, from 2016 through 2020, the number of UMPG writers who received any interactive audio streaming mechanical and performance income and, by reference to the total writer share of interactive audio streaming income shown on **COEX-1.3** (after deduction of UMPG's NPS of such income), the average income received by UMPG's writers from interactive audio streaming (again, including only those UMPG writers who actually received any interactive audio streaming income).

63. As shown on **COEX-1.4**, in 2016 [REDACTED] who received interactive audio streaming mechanical and performance income. Taking the data shown on **COEX-1.3**, in 2016 the total mechanical and performance income from interactive audio streaming (including UMPG's NPS share and also the writers' share of performance income) [REDACTED] [REDACTED] (line 45). To determine the interactive audio streaming income of UMPG's writers, one has to deduct UMPG's NPS. As shown on lines 47 and 48 of **COEX-1.3**, UMPG's NPS from

interactive audio streaming in [REDACTED] Deducting UMPG's NPS from the total of [REDACTED] With [REDACTED] writers receiving interactive audio streaming income, the average total income of each writer, performance and mechanical, [REDACTED]

64. However, as I said above, the growth of interactive audio streaming has resulted in the sharp diminution of UMPG's and its writers' mechanical income from the sale of physical records and digital downloads. Just looking at the average income of UMPG's writers in 2016 from interactive audio streaming of [REDACTED]

65. As shown on lines 12 and 13 of **COEX-1.3**, between 2009 and 2016, the mechanical income of UMPG and its writers from physical records and digital downloads [REDACTED]

[REDACTED] As shown on lines 27 and 28, UMPG's NPS from the sale of physical records and digital downloads in 2009 [REDACTED] Deducting this amount from the total mechanical income [REDACTED]

[REDACTED] In 2016, again as shown on lines 27 and 28, UMPG's NPS from the sale of physical records and digital downloads [REDACTED] and deducting this amount from the total mechanical income of [REDACTED]

66. Simply put, between 2009 and 2016, the songwriter share of mechanical income [REDACTED] While the songwriters receiving interactive audio streaming income in 2016 [REDACTED]

To place this diminution in mechanical income in the same basic human terms as the average songwriter income from interactive audio streaming, if this

67. In short, the

What our writers [REDACTED] as interactive streaming substituted for and replaced the sale of physical records and digital downloads was [REDACTED]

68. Even with the growth in the interactive streaming from 2016 to 2020, as shown on **COEX-1.4**, the average income of UMPG's writers in 2020 from interactive audio streaming (again, before taking into account the impact of the loss of mechanical income from the sale of physical records and digital downloads as interactive audio streaming replaced, albeit incompletely, such sales) [REDACTED]

69. Again, taking the data shown on **COEX-1.3**, in 2020, the total mechanical and performance income from interactive audio streaming (including both UMPG's NPS and the writers' share of performance income) [REDACTED] (line 45). Deducting UMPG's NPS of

⁷ To be clear, I am not saying that the same writers or even the same number of writers who received mechanical income in 2009 were the same as the writers in 2016. However, I believe that simply by looking at the average amount of mechanical income, the negative impact that interactive audio streaming has had on UMPG's writers receipt of mechanical income is underscored.

██████████ as shown on lines 47 and 48, leaves the total writers' share of interactive audio streaming royalty income ██████████. As shown on **COEX-1.4**, with ██████████ writers receiving interactive audio streaming income, the average total income of each writer, performance and mechanical, ██████████
██████████

70. However, simply looking at the average income of our writers from interactive audio streaming in 2020 again fails to take into account ██████████
██████████
██████████ they previously received from the sale of physical recordings and digital downloads.

71. As shown on lines 12 and 13 of **COEX-1.3**, between 2016 and 2020, UMPG's and its writers' mechanical income from physical records and digital downloads ██████████
██████████ (as shown in paragraph 54 above). As noted above, after deducting UMPG's NPS ██████████
██████████ In 2020, after deducting UMPG's NPS of ██████████ (again, lines 27 and 28) from ██████████, the writers' share of such mechanical income was ██████████
██████████ So the reduction between 2016 and 2020 was ██████████
██████████

72. While the songwriters who received any interactive audio streaming income in 2020 received on average total interactive audio streaming income of ██████████ between 2016 and 2020 they also experienced ██████████ in the writers' share of mechanical income from the sale of physical records and digital downloads ██████████. If that amount were averaged over

the same number of writers as was the receipt of interactive audio streaming income [REDACTED] it would offset the average writers' income from interactive audio streaming by [REDACTED]

73. However, if instead just examining the reduction in mechanical income experienced by our writers between 2016 and 2020 and we looked at the [REDACTED] [REDACTED] from the sale of physical records and digital downloads [REDACTED] (again, assuming the same number of writers as that who received interactive streaming income in 2020) [REDACTED]
[REDACTED]
[REDACTED]

74. My point here, as shown in **COEX-1.3**, is straightforward: simply looking at both the top-line numbers and the growth of domestic interactive audio streaming revenues between 2016 and 2020 obscures its impact on songwriters generally and [REDACTED]
[REDACTED]
[REDACTED] as interactive audio streaming and the access model of consumption took hold and came to predominate the distribution of music, replacing the ownership model that had endured for over 100 years. As the financial information also shows, interactive audio streaming has not promoted the growth of income elsewhere for songwriters and publishers. Instead, the income we receive from the interactive audio streaming services has to be evaluated on its own as a stand-alone source of income.

75. Taking the data from the foregoing exhibits and examining UMPG's costs, including its overhead costs shown on its Profit and Loss statement (**COEX-1.5**), one can assess the relative contribution of interactive audio streaming income to UMPG's net profits. Using 2019 as a sample year (as it preceded the pandemic), UMPG's revenues from US operations in 2019, as

reflected on **COEX-1.3** were [REDACTED] Our revenues from U.S. interactive audio streaming in 2019, inclusive of mechanical income and performance income, were [REDACTED]

[REDACTED] In addition, the songwriters received directly from their PROs their songwriter share of performance income in the same amount as the publisher share of performance income [REDACTED]

76. As also shown by these exhibits, our NPS was [REDACTED] from the interactive streaming income, as shown on line 47 of **COEX-1.3**. The overall NPS for the interactive audio streaming income that UMPG processed (which does not include the songwriter share of performance income) [REDACTED] Including the songwriter share of performance income [REDACTED]

[REDACTED] As shown at line 45 of **COEX-1.5**, our total NPS in 2019 was [REDACTED]

77. As detailed on **COEX-1.1** (and discussed above), in 2019, UMPG paid [REDACTED] (and our unrecouped balance, net of recoupments that year, [REDACTED]). In addition, our overhead costs in connection with our U.S. operations in 2019, as shown on lines 112 through 138 of **COEX-1.5** [REDACTED] In addition, our other costs reflected on **COEX-1.5**, [REDACTED]

78. In terms of the issue of promotion versus substitution, I want to briefly address UMPG's income from the newly developing interactive audio/visual services (YouTube is not a new service), which I view as competing with the interactive audio services and not being

promoted by them. As I have said above, UMPG characterizes its reproduction income from interactive audio/visual platforms as [REDACTED]

79. Blanket licensing to these interactive audio/visual platforms is much like the mechanical licensing of interactive audio streaming services except for one very important difference: whereas music publishers are subject to compulsory licensing for interactive audio streaming services (with the rates being set by the Copyright Royalty Board), there is no compulsory license for the blanket reproduction licenses issued to interactive audio/visual streaming services, as they are not Section 115 licenses. Because the rates paid for these blanket licenses are negotiated in a free and open market without compulsion, unlike the interactive audio streaming market, we have the opportunity to seek protection against the business strategies of our licensees that affect the royalties we receive. Like any other free market negotiation, there is a give and take in order to reach agreements that are reasonably satisfactory to both sides.

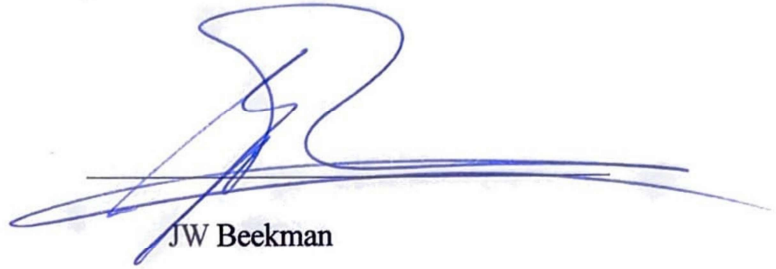
80. And this is in my view an important point: even though this is a market negotiation without a compulsory licensing process, the market for interactive audio/visual services like YouTube, clears. Licenses are negotiated and signed. Compositions are licensed and recordings are licensed. And companies continue to enter this market and seek and obtain blanket licenses from both music publishers and record labels. The free market functions because both licensors and licensees have a common interest in reaching agreement.

81. Because our goal as music publishers is to properly exploit the songs of our songwriters and to generate income, each of these forms of exploitation and each of these sources of income has importance to us because they provide the revenue we need to properly and fairly compensate our songwriters and to generate the income we need to continue to invest in the

songwriters of the future and to grow our own business. As I have said, because interactive audio streaming does not promote the growth of other sources of income, it has to be evaluated as a stand-alone source of income and, given its growing importance, as it continues to substitute for and replace other sources of income, it is important to writers and publishers alike to make sure that our income is protected against business strategies of the Services that have the effect of suppressing the income we receive.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

October 13, 2021



JW Beekman

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21–CRB–0001–PR
(2023–2027)

WRITTEN DIRECT TESTIMONY OF PETER BRODSKY

I. INTRODUCTION AND BACKGROUND

1. My name is Peter Brodsky and I am Executive Vice President, Business and Legal Affairs at Sony Music Publishing, formerly Sony/ATV Music Publishing.

2. Sony/ATV Music Publishing was formed in 1995 with the merger of the original incarnation of Sony Music Publishing and ATV Music, which was owned by entertainer Michael Jackson. Michael Jackson had purchased ATV Music, which included the John Lennon–Paul McCartney song catalog, in 1985. Sony Corporation of America later acquired EMI Music Publishing and combined it with Sony/ATV Music Publishing to form one of the largest music publishing administrators in the world. Earlier this year, Sony/ATV Music Publishing rebranded as Sony Music Publishing. In this statement, for convenience, I will use “SMP” to refer to both Sony Music Publishing and Sony/ATV Music Publishing.

3. SMP owns or controls many of the most successful and valuable music catalogs of all time, including Carole King, Duke Ellington, Lennon/McCartney, Leiber/Stoller, Michael Jackson, Motown (Jobete), Paul Simon, and Stevie Wonder, and

songs written by countless contemporary artists such as Beyoncé, BTS, Calvin Harris, Ed Sheeran, Lady Gaga, Luke Bryan, Miranda Lambert, Olivia Rodrigo, Pharrell Williams, and Rihanna. The catalog of works owned or administered by SMP includes many of the world's best known and most popular songs, including "Ain't No Mountain High Enough," "All You Need Is Love," "Blue Moon," "Bohemian Rhapsody," "Can't Take My Eyes Off You," "Daydream Believer," "Every Breath You Take," "Have Yourself A Merry Little Christmas," "Hey Jude," "How Sweet It Is," "I Heard It Through The Grape Vine," "The James Bond Theme," "Let's Get It On," "Let It Be," "Mamma Mia," "Maggie May," "Over The Rainbow," "Shout," "Singin' In The Rain," "Start Me Up," "That's The Way (I Like It)," "The Loco-Motion," "We Are The Champions," "We Will Rock You," "What's Going On," "Wild Thing," "Yesterday," "You've Got A Friend" and "You've Lost That Loving Feeling," to name just a few. It also includes current hits such as "Afterglow" (Ed Sheeran), "Down To One" (Luke Bryan), "Dynamite" (BTS), and "good 4 u" (Olivia Rodrigo).

4. I have worked in the business of music publishing for over twenty-five years. I started at BMG Music Publishing in 1996, where I ultimately rose to Head of Business and Legal Affairs. I left BMG in 2007 to join SMP in my current role.

5. I am deeply familiar with the music publishing business generally, and the business of SMP in particular, including its activities in the digital music space, which includes interactive streaming. I have been and remain involved in the licensing of SMP's musical works to various music users, including to interactive streaming and limited download services engaging in Licensed Activity, as the term is used in 37 C.F.R. § 385 subparts C & D (collectively, "Eligible Services"), and other digital services in the United

States, including Eligible Services and other digital services operated by [REDACTED]
[REDACTED]. I also play a role in such activities outside of the United States. I report to the CEO of SMP, Jon Platt.

6. I submit this testimony in support of the Copyright Owners' direct case in this proceeding. This statement is based on my personal knowledge and information made available to me in the course of performing my duties while I have been employed by SMP.

7. I submitted written direct testimony in the prior *Phonorecords III* proceeding in support of the Copyright Owners' direct case. A copy of my written direct testimony in *Phonorecords III* (without the accompanying exhibits) is attached as COEX-2.1 hereto. I incorporate that testimony by reference and refer to it in various paragraphs herein (and cite to it as "Brodsky P3 WDT").

II. MUSIC PUBLISHERS PLAY A CRITICAL ROLE IN THE CREATION AND DISSEMINATION OF MUSICAL WORKS

8. Music publishers like SMP play a critical role in the creation and dissemination of copyrighted songs, including through Eligible Services. They identify and sign both novice and experienced songwriters, which requires them to make significant and often risky investments, including by providing advances and other financial support to songwriters so that they can focus on writing music. They support songwriters by arranging collaborations; holding writing workshops, sessions and camps; and providing other creative support. They market and promote songs to recording artists, record labels, producers and managers so that they may be recorded, and to other licensees such as filmmakers, television producers and advertisers. They negotiate and administer licenses for the reproduction, performance, synchronization and distribution of songs, including

licenses with Eligible Services. They track the exploitation of copyrighted songs; collect, process and audit the royalties paid from thousands of different sources; and account to and pay songwriters for these exploitations. And they protect songwriters' interests in their copyrights by registering copyrights and litigating acts of infringement. Most of these functions are things that individual songwriters either could not perform, or could not afford to perform, on their own. And most of these functions require the experience, skills, connections and other resources that only a music publisher (as opposed to private equity firm or other passive investor in a music copyright asset) can provide.

9. In sum, publishers support and assist songwriters in the creation of songs, work to make those songs widely available so that they may be enjoyed and experienced by as many people as possible, and help songwriters realize the economic value from their creative works so that they have a strong incentive and ability to continue to create. Publishers expend significant resources and incur significant costs to engage in each of the above-described activities, which resources and costs are further discussed below and in the accompanying Written Direct Testimony of Thomas Kelly, SMP's Global Chief Financial Officer ("Kelly WDT").

10. Before I discuss in further detail the contributions made by music publishers in the creation of music for the public's enjoyment, it should be noted that there are several different types of songwriters, each with different combinations of income streams that derive from their creative efforts. Music publishers like SMP work with each type of songwriter and customize their approach to supporting each type of songwriter accordingly. First, there are "pure" songwriters who strictly write songs that are recorded and performed by others. For these songwriters, their income is largely dependent on the

license fees earned solely from the songs they write. Of the active songwriters signed with SMP, approximately [REDACTED] are “pure” songwriters who generally do not earn music-industry income other than from licenses for the use of their songs. Second, there are “singer-songwriters” who write, record and perform their own music and therefore also generate income from recordings, concerts, merchandise and/or personal appearances (although, during the COVID-19 pandemic, income from live performances and other appearances was sharply reduced or eliminated entirely). There are also “producer-songwriters” who, in addition to writing songs, perform various functions typically conducted by music producers or recording artists, such as selecting and arranging songs, creating “tracks,” “beats” or other portions of the final sound recording, coaching and guiding the recording artists, and supervising the recording, editing, mixing and mastering process. Unlike “pure” songwriters, producer-songwriters may (but not always) participate in royalties from recordings. We have found, however, that particularly in the hip hop, rap, and progressive R&B genres, producer-songwriters have over the last decade or so been playing an increasingly greater role in the creative aspects of the sound recording (in addition to the underlying musical composition that the producer wrote or co-wrote).

11. SMP also represents the songs of countless retired or deceased songwriters. Many retired songwriters (and heirs of deceased songwriters) are elderly and, like the “pure” songwriters, their income is largely dependent solely on the license fees earned from their compositions. For example, many of the great “Motown” writers from the 1960s (such as Marvin Gaye and Norman Whitfield) have passed, and the songwriting royalties that we collect and help generate through our licensing activities help sustain the heirs of these writers.

A. SMP's Role in Discovering Unknown Songwriters

12. As I explained in my *Phonorecords III* statement, the entire music industry derives from the irreplaceable creativity of songwriters, without which there would be no songs for artists to record, no content for digital music services to offer their customers to stream, and ultimately no music to entertain and inspire. SMP is first and foremost a songwriter-focused company, and we work hard for the benefit of our songwriters.

13. One of the most important functions of a music publisher is discovering the talent upon which the rest of the industry is built. SMP and other music publishers spend a substantial amount of time and money searching for gifted new songwriters. A majority of SMP's talent discovery is conducted by its Artist & Repertoire ("A&R") staff, which we refer to at SMP as our "Creative Department." In the United States, our Creative Department is comprised of ■ full-time employees across five offices located in the country's most active music and songwriting "hot spots"—New York, Los Angeles, Nashville, Atlanta and Miami. Internationally, there are ■ additional full-time employees in the Creative Department who are located in twenty-one countries around the world, with SMP's international A&R hubs in London, Stockholm and Sydney.

14. SMP often partners with songwriters at early stages in their careers, which means we take creative risks on songwriters without any track record or guarantee of commercial success. Most "pure" songwriters that we sign are relatively unknown at the time we sign them. And we often sign singer-songwriters before they have a record deal, as record labels typically invest in artists only once commercial success is more assured—including by the fact that the artist is backed by the support of a music publisher. In my *Phonorecords III* statement, I described our early work with Lady Gaga. (Brodsky P3

WDT ¶ 16.) Another example is our early signing of singer-songwriter Rachel Platten in 2011. After Rachel was signed with us, our Senior Vice President, Co-Head of West Coast A&R, Amanda Berman-Hill, worked closely with Rachel to help her develop her sound, including by introducing Rachel to songwriter Dave Bassett. Together, they co-wrote “Fight Song,” which led to Rachel signing a record deal with Columbia Records in 2015, and releasing multiple records. Since their introduction by SMP, Rachel and Dave have also collaborated on other projects, including the song “Astronauts” that was released on Rachel’s 2016 album, “Wildfire.”

15. SMP’s Creative Department searches for and identifies talent in several different ways, each of which requires a fusion of sharply-honed interpersonal skills, cultivated personal relationships, an ear for musical talent and creativity, knowledge and instincts accumulated through experience, and a passion and drive for long-term talent development.

16. Members of our Creative Department identify up-and-coming songwriting talent by attending live “gigs” at performance venues, showcases, festivals and similar events throughout the world. They comb through artists’ materials on the Internet, including on sites such as [REDACTED]

[REDACTED] in order to both discover new talent and observe musical trends that will inform future assessments on whether a particular type of song or songwriter will be commercially successful. And they leverage the strong relationships they and SMP’s executives have with artists, record label executives, producers, managers, attorneys and other professionals in the music industry, which are reinforced by the reputation SMP has as a champion for songwriters and their careers. From these relationships, leads are often

brought to our attention, whether through a formal introduction, the passing of a demo recording, or a recommendation to check out the work of an unknown songwriter. Members of our Creative Department follow these leads, and apply their knowledge, experience and instinct to determine whether to sign and develop the writer. Writers whom we may be interested in signing and developing are often invited to our offices to showcase their material.

17. The process of identifying new songwriting talent is laborious, requiring considerable time, effort, and persistence. For every new songwriter SMP wishes to sign and develop, the Creative Department has typically reviewed and assessed hundreds of other leads, attended dozens of live events, and spent countless hours listening to music and researching potential prospects.

18. At the end of the day, it is through the tireless dedication of our Creative Department that SMP has been able to identify and partner with some of the brightest creative talent of our time, resulting in a roster that currently includes [REDACTED] active songwriters and producers. Our signings have included both established singer-songwriters (such as Beyoncé and Miley Cyrus), and singer-songwriters that were, at the time we signed them, not well-known but that are now very well-known (such as Khalid and Jack Harlow). Some “pure” songwriters that we signed may not be known by many people at all. SMP’s notable signings of possibly lesser-known songwriters and the artists they placed songs with (in parentheses) in the last several years include Dan Nigro (Olivia Rodrigo, Conan Gray), Bloodpop (Lady Gaga), Aaron Dessner (Taylor Swift), Jon Bellion (Miley Cyrus, Justin Bieber) and Pardison Fontaine (Cardi B).

19. A few examples of recent signings illustrate the different ways we discover previously-unknown talents.

20. We frequently discover songwriters through relationships with music industry professionals. For example, artist-songwriter Jack Harlow was first placed on the radar of our Senior Vice President, Creative, Ian Holder, by another Creative Team executive who had received a suggestion from a manager that he check out Jack. At the time, Jack was not yet established, and he had not even been identified by our proprietary research team (which I discuss in ¶ 23 below). Ian closely followed Jack's online presence for months to assess his creative style and songwriting talents, and eventually met with him in person—before Jack had created a record—to get to know him personally and gain a better understanding of his potential career trajectory. Several months later, Ian attended Jack's performance at music venue S.O.B.'s in New York City, which allowed Ian to observe Jack's abilities to perform and energize the audience. Backstage at that event, Jack invited Ian to attend a gig in Jack's native Kentucky several months later. Ian's appearance at the hometown show, which took place just days before Christmas, helped to demonstrate his genuine belief in Jack's talents as a songwriter and his desire to support Jack and his songwriting career. Thereafter, their relationship took root. Since signing with SMP, Jack has gone on to release several songs that have been met with commercial and critical acclaim.

21. Additionally, our Senior Vice President, Co-Head of West Coast A&R, Jennifer Knoepfle, signed singer-songwriters Tate McRae and Leon Bridges, respectively, based on her relationship with their managers, and signed songwriter Aaron Dessner after being introduced to Aaron by an attorney they had both worked with. Aaron went on to

write several songs for Taylor Swift, including “Cardigan,” “Willow,” and “The 1.” Another one of our Creative Team executives, Nick Bral, identified singer-songwriter Conan Grey after Conan’s manager reached out to Nick to ask for suggestions for a producer for Conan to work with. Nick then reviewed Conan’s work through social media and attended Conan’s show in Texas before he signed with SMP. Songwriter Mike Sabath signed with SMP after his manager—a former intern of one of our A&R executives—brought Mike to the attention of our Creative Team. Mike has gone on to write songs for recording artists like Lizzo, the Jonas Brothers and Meghan Trainor, to name a few.

22. We also discover songwriters through word of mouth, by combing through materials on the internet and scouring the thousands of demos we receive each year. For example, our Creative Team discovered rock band Lord Huron after receiving and listening to the band’s demo recordings.

23. We discovered the producer-songwriter Callan Wong through our proprietary data research program. Callan helped write the hit song “Blueberry Faygo,” recorded by Lil Mosey, which trended on social media platforms before becoming a sensation in the U.S. and abroad. Our proprietary research program [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Our Creative Team also has [REDACTED] employees dedicated to researching and sourcing potential leads for new talent.

24. We also discover and sign songwriters through our relationships with other writers who are on our roster. For example, SMP writer Dan Nigro was instrumental in

facilitating our signing of singer-songwriter Olivia Rodrigo, whom Dan was friends with. Our Creative Team had been interested in signing Olivia, who was first identified by one of our Creative Team members through her role in the musical television series, “High School Musical: The Musical: The Series.” Dan praised Olivia’s songwriting and musical talents to our A&R team, and subsequently made the introduction between Olivia and our team, which led to her signing with SMP.

B. SMP’s Role In Supporting Songwriters Through Financial Support

25. Once we find a talented songwriter we wish to work with and develop, we negotiate and (hopefully) sign an agreement with the writer. These agreements confer upon SMP various rights to commercially exploit the songwriter’s work, including: (i) the right to license the reproduction and distribution of the songwriter’s musical works (including in phonorecords and audiovisual works); (ii) the right to license the public performance of such works (and to register such works with relevant performing rights organizations (“PROs”), such as ASCAP and BMI, so that such societies can grant performing rights licenses); (iii) the right to license the synchronization of such works in timed relation with visual images; and (iv) the right to license the publication or display of the lyrics and/or musical notation, tablature, or sheet music of such works. SMP has an obligation to collect the royalty revenues from these licenses and to account and pay them to the songwriter in accordance with the revenue allocation (“split” or “share”) provisions of the agreement.

26. With respect to the revenue splits, there are generally three types of arrangements. The most common arrangement today is a “co-publishing” deal, where (with some minor variations in certain cases) the songwriter retains 75% of the royalties resulting from the writer’s works (the entirety of the so-called “writer’s share,” which

accounts for 50%, and half of the so-called “publisher’s share,” which accounts for the remaining 25%), and SMP receives 25% of the royalties. Historically, the “traditional” or “standard” publishing deal was one where the writer retained the entire 50% writer’s share of royalties, and SMP retained the entire 50% publisher’s share. However, such revenue arrangements are now a rarity, having largely been replaced by co-publishing arrangements. Under either a co-publishing or traditional publishing deal, the songwriter typically assigns to SMP a negotiated share of the copyright, usually subject to a reversion after a certain period. There are also administration deals, which involve no assignment of copyright shares. Rather, the songwriter receives 100% of the royalties generated from his or her works after deduction by SMP of an administration fee [REDACTED].

27. I previously testified that the average publisher’s share of royalties had been decreasing over time. (Brodsky P3 WDT ¶ 28.) Negotiations typically start at a 75%/25% split in favor of the songwriter. In fact, some of our administration deals have administration fees [REDACTED]. And, unlike in agreements between record labels and recording artists, SMP’s agreements with its songwriters generally do not contain deductions against writer’s royalties for significant publisher costs. As addressed by Thomas Kelly in his written direct testimony and accompanying exhibits, when one factors in the songwriter share of public performance income, which is paid directly to writers by the PROs, our writers received on average [REDACTED] every dollar earned in interactive streaming income in fiscal year 2021.¹ (See Kelly WDT at ¶ 74.)

¹ SMP’s fiscal year ends on March 31 of each year, such that, for example, fiscal year 2021 covers April 1, 2020 through March 31, 2021.

28. A fundamental aspect of each publishing agreement is our payment to the songwriter of a recoupable advance against future earnings. Advances, typically made in a lump sum or in installments, provide songwriters with financial support so that they can concentrate on developing their craft and creating the musical compositions that ultimately get streamed by the digital services and consumed by the public. Publisher advances are critical to the survival of songwriters, especially at the earliest stages of their careers, but are important for even established songwriters. By providing meaningful income to songwriters, advances ease the financial challenges songwriters face by helping to fund the everyday requirements of the songwriter's career, including for instruments and equipment, transportation to and from performances, professional bills, management commissions and legal expenses, and general living expenses. Advances also make songwriting a more sustainable career choice, particularly since it often takes several years for a song to actually earn any revenue, even after it is recorded and released.

29. As I noted, the advances we pay songwriters are generally recoupable—but not returnable—against future earnings. Publisher advances are generally recouped from mechanical royalties, the 50% “publisher's share” of performance royalties, and synchronization royalties (discussed below), if any. On the other hand, the 50% “writer's share” of performance royalties is generally not available to the publisher to recoup the advance, as these royalties are almost always collected and paid directly by the PRO to the songwriter.

30. The amount of the advance is negotiated along with the other contractual provisions and varies depending on a variety of factors. One such factor is the anticipated level of commercial success of the songwriter. Songwriters who are established or have

already had some level of commercial success will typically have higher advances than those of newly-discovered, lesser-known or untested songwriters. Another factor that may also impact the size of the advance is competition amongst publishers. If another publisher (or investment company) would also like to sign a deal with the songwriter, the advance—and the writer’s share of royalties—is likely to be greater. We have seen increased competition in recent years, particularly from private equity and other investment companies, for deals with songwriters who have already achieved commercial success. As noted above, however, these companies generally do not invest in the infrastructure or people necessary to provide any of the services of a true publisher, so they instead typically hire a publisher like SMP to handle those tasks (for a fee). Nor do they typically seek out or invest in the songwriters of the future. And it remains to be seen whether such companies will ultimately be able to provide a return to their investors from the music assets that they have purchased.

31. An advance constitutes a publisher’s direct investment in a songwriter’s career, where the publisher will be paid back only if and when the songwriter earns royalties from his or her works equaling or exceeding the amount of the advance (and then only those royalties available to us for recoupment). As detailed more fully in paragraph 43 of Thomas Kelly’s direct testimony and accompanying exhibits, in the United States alone, SMP paid [REDACTED] in new advances in fiscal year 2020, and [REDACTED] in new advances in fiscal year 2021. These investments constituted, respectively, [REDACTED] of SMP’s total U.S. revenue in those years.

32. While music publishers like SMP invest significant resources into developing the talents of those songwriters that they have signed, the prospects of fully

recouping an advance are uncertain. There is, of course, no guarantee that any given song will be recorded or, if it is recorded, that it will be a commercial success. In fact, while SMP takes on the risk attendant to signing songwriters in the nascent stages of their careers, when they have little to no track records of previous commercial success, only a small percentage of songwriters signed to publishing contracts achieve any significant success.

Again, as detailed more fully in Thomas Kelly's statement, [REDACTED]

[REDACTED]. (See Kelly WDT ¶ 38.)

C. SMP's Role in Developing Songwriters To Build Enduring Careers

33. Once a songwriter signs a deal with SMP, our Creative Department expends significant time and resources working with the songwriter to nurture and develop their creative skills, and ultimately get their songs recorded.

34. At the ground level, this support starts with our Creative Team's dedication to helping songwriters hone the craft of songwriting. Each of our songwriters works with a dedicated team of one or more experienced creative professionals who review songs, offer constructive feedback and suggest new directions or ideas as compositions are being created, edited and refined.

35. SMP also provides our songwriters with access to professional recording studios and writing rooms. When songwriters are in the studio, members of our Creative Department are present too, working together with our writers to help create new songs that can eventually be marketed to record labels, artists and others. And for our singer-songwriters, our studios provide a place where they can also hone their performance skills. As I noted in my *Phonorecords III* statement (at ¶36), SMP's Nashville office has a

professional-quality recording studio on premises. In 2020, SMP established a new office in Atlanta with a recording studio complex on the premises. We also lease additional studios in Los Angeles, [REDACTED]. We have writing rooms available to our songwriters in New York and Nashville, and [REDACTED].

36. Publishers also cultivate the success of our songwriters by fostering collaborations between or among them and other songwriters and artists. For many writers, songwriting is a collaborative creative venture. While this is exemplified by famous songwriting duos, such as Lennon/McCartney and Leiber/Stoller, today's successful collaborations often involve teams of three or more songwriters, with certain musical genres tending to have more and larger songwriting teams than others. For example, it is not uncommon for a successful hip hop song to have as many as eight to ten songwriter collaborators.

37. We have assisted songwriters in putting together successful writing teams of all sizes and for all genres of music. In addition to those collaborations discussed in my *Phonorecords III* statement (at ¶ 37), some of the successful collaborations we have recently facilitated include introducing songwriter Joel Little to singer-songwriter Khalid and, separately, introducing Joel to the lead vocalist of the band Imagine Dragons, Dan Reynolds. Joel and Khalid co-wrote several songs on Khalid's debut album, including "8teen" and "Young Dumb & Broke," and Joel and Dan co-wrote two of Imagine Dragon's biggest singles, "Whatever It Takes" and "Follow You." We also introduced Chloe Bailey to Theron Thomas, who co-wrote her first single, "Have Mercy," and introduced Mike Sabath and Scott Harris, who collaborated on the song "Don't Go Yet," performed by

Camilla Cabello. Our Creative Team also brought together artist-songwriter IDK and producer-songwriter Ronny J, who together created numerous songs, some of which were placed on IDK's own album, and others that were recorded by artist Ameer Vann.

38. Frequently, collaborations and song placements also result from multiday songwriting camps that we host [REDACTED] in different cities across the country. These camps take several forms, but generally center around the creation of particular types of songs for a specific purpose. We host camps and songwriting sessions that focus on songwriting suiting particular musical genres, recording artists, films, television shows, or commercials or brands, and we invite a small group of songwriters to participate and collaborate on the particular area(s) of focus. Members of our Creative Department offer guidance on the songs being created throughout the process and, at synchronization (or "sync") camps, addressed in more detail below, members of our Synchronization Team liaise between our songwriters and our film, television and advertising contacts to ensure our songwriters are provided with creative direction that sets them up for success. In fact, in 2018, the New York Times published an article in the newspaper's business section about SMP's sync camps, which discussed the numerous successful collaborations and sync placement opportunities SMP has created for its songwriters through sync camps.²

39. The support that SMP provides to songwriters—through monetary advances, creative resources and guidance, access to facilities, and by leveraging its deep industry connections—plays a critical role in the creation of music enjoyed by the public. While a limited number of songwriters find commercial success relatively quickly, for

² See COEX-2.2 (Janet Morrissey, *Need a Song for Your Commercial? Try These Campers*, N.Y. Times (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/business/media/need-a-song-for-your-commercial-try-these-campers.html>).

most, building a sustainable career as a songwriter requires the enduring support of continuous talent development from (and a true partnership with) our Creative Department and our experienced executive team. Even with our professional guidance, it can take from [REDACTED] for a writer to achieve commercial success. And of course, SMP's significant investment of time, money and human resources in nurturing its songwriters is no guarantee of success. Yet the risk shouldered by music publishers like SMP results directly in the creation of songs, making it an essential aspect of the music industry from which other stakeholders, including Eligible Services and other digital services, and ultimately the public, benefit.

D. SMP's Role In Monetizing Songwriters' Works Through The Promotion, Placement and Licensing of Songs

40. Another essential role played by music publishers is to help monetize songwriters' music to help them build sustainable careers. In furtherance of this goal, music publishers promote and place the works of their songwriters with artists, producers and A&R people at record labels, film and television producers, and advertising and brand executives, and manage all of the licensing requirements to exploit songwriters' works.

41. As I mentioned in my *Phonorecords III* statement (at ¶¶ 40-41), for singer-songwriters and producer-songwriters who have not yet been signed to record labels, our promotional role early in their careers is pivotal. Members of our Creative Department are skilled in connecting different people with compatible or synergistic musical styles, ideas and approaches. By leveraging our extensive and diverse network of contacts in the recorded music industry, we help many promising songwriters obtain deals with labels that are a good fit, and provide guidance during the process of signing a deal. Similarly, for

producer-songwriters, we help find the right artists for them to work with and seek out opportunities for them to co-write or co-produce on existing projects.

42. For example, in 2019 our Creative Team signed songwriter Saint Bodhi, who was known to be a “topliner,” or vocalist who creates melodies, harmonies and lyrics that sit atop instrumental tracks. We worked with her to create demo recordings, which we sent out to our contacts around the industry in an effort to arrange collaborations. Saint Bodhi’s recordings were so well received, two record labels found themselves in a bidding war to sign her. We provided advice to Saint Bodhi on navigating the process of selecting a record label that was the best fit for her, and based on our close relationship with her, we were also able to help the record labels understand Saint Bodhi’s creative style and process, which led to her signing a record deal with Def Jam Recordings. Additionally, as I noted in my *Phonorecords III* statement (at ¶ 42), in certain instances where we have not been able to find a suitable label for the artist-songwriter, we have released their music ourselves. One such example includes singer-songwriter Ginette Claudette.

43. In an effort to maximize the reach of our songwriters, we also collaborate and match our songwriters’ songs to different recording artists, record labels and producers. In some instances, our Creative Team works with our songwriters to create a song for a particular recording artist or project. In those cases, our Creative Team must leverage industry relationships to gain a full picture of the creative direction of the particular project, so that they can ensure they are setting our writers up for success. Recently, our Creative Team oversaw all of the songwriting sessions for King Princess’s upcoming album, which led to us introducing King Princess to her two main collaborators on the project, songwriters Aaron Dessner and Ethan Gruska. Similarly, we coordinated the songwriting sessions for

Tate McRae’s album, which led to placements by our writers Dan Nigro, Alexander 23, Greg Kurstin, Aaron Dessner and Joel Little.

44. In other instances, we match songs that have already been created by our writers to recording artists and record companies, sometimes repurposing a song that was originally written for a different project. For example, Jack Antonoff and Joy Williams co-wrote a verse and chorus of a song for Joy to record but that she did not ultimately record. SMP shared the partially-completed song with Rachel Platten, who build upon it and ultimately recorded the final song, “Stand By You,” which was released as Rachel’s second single. Similarly, SMP matched the song “Follow You” with Imagine Dragons after the original album that the song was slated for did not get recorded. The version recorded by Imagine Dragons topped Billboard’s “Rock & Alternative Airplay” chart, making it the band’s fifth Number 1 single.

45. Also as I discussed in my *Phonorecords III* statement (at ¶¶ 43-45), in addition to promoting songs and songwriters to record companies, we also seek out opportunities to license the right to synchronize our songs with visual images for use in films, television programming, commercials, videogames and similar audiovisual works (“sync rights”), which is a critical part of our efforts to increase exposure and maximize opportunities for financial remuneration for songwriters and their works.

46. As noted above, we hold songwriting camps [REDACTED] specifically focused on creating songs for synchronization placement. The popularity of some of the songs created in our sync camps has extended beyond and grown after the original sync placement. For example, the song “Get Loud For Me” was written by two of our songwriters, Gizzle and Mike Sabath, after the pair were introduced by SMP’s Global Chief

Marketing Officer, Brian Monaco. As reported in the New York Times, after “Get Loud For Me” was placed in an advertising campaign for Bose, the breakout success of the song led to numerous other sync placements across different media, including in advertisements for Adidas, and in the video game “Speed Payback.” The revenue generated by “Get Loud for Me” did not end with sync placements—the song became so popular, it was released as a single and streamed millions of times, and it led Bose to sponsor part of Gizzle’s subsequent tour.

47. For songwriters, synchronization placements also enhance their profiles as songwriters, leading to additional songwriting and other opportunities. The hit songwriter MoZella is an example of a success story that emerged from our sync songwriting camps. Her success writing multiple songs for commercials created at sync camp led to collaborations where she wrote hit songs like “Wrecking Ball,” recorded by Miley Cyrus, the Grammy-nominated “Love So Soft,” recorded by Kelly Clarkson, and “Perfect,” recorded by the band One Direction. Similarly, we secured sync placements for various songs written by singer-songwriter Sam Fischer, including in a trailer for the 2018 film “Brian Banks.” These successful sync placements resulted in him releasing a song called “This City,” which has been streamed hundreds of millions of times, and securing a record deal with RCA Records. Most recently, Sam co-wrote and was a featured artist on the lead single on Demi Lovato’s latest album, “What Other People Say.”

48. In some cases, sync licenses result in a resurgence of interest in songs that may have slipped from the spotlight, or the introduction of older songs to a new generation of fans. In addition to the examples I provided in my *Phonorecords III* statement (at ¶ 45), more recently, the 2015 song “River” by singer-songwriter Leon Bridges experienced

renewed streaming interest after it was licensed for use in the HBO limited series “Big Little Lies” in 2017. I also noted in my last statement that the Queen catalog had received renewed attention after some of the band’s songs were placed in major advertising campaigns. Yet that resurgence was dwarfed by the increase in streaming activity the catalog experienced after the release of the 2019 Queen biopic “Bohemian Rhapsody,” in which we placed numerous Queen songs. After the film’s premiere, the soundtrack became Queen’s highest charting album on *Billboard*’s song charts in almost four decades, and the song “Bohemian Rhapsody” re-entered *Billboard*’s “Hot 100” chart for the third time (the second time was in 1992 after the song was featured in another sync placement, the film “Wayne’s World”).

49. SMP also issues public performance licenses for our songs. While most public performance licensing is currently done through the PROs, such as ASCAP and BMI, we frequently issue “grand” or “dramatic” performing rights licenses (i.e., licenses to use our musical works in “dramatico-musical” works such as musicals and other theatrical productions, revues and other works that tell a story). As I stated in my *Phonorecords III* testimony, SMP is fortunate to represent many iconic songs and songwriters featured in successful theatrical productions that we have licensed and promoted, including “Jersey Boys,” “Beautiful: The Carole King Story,” “Mamma Mia!,” “Motown: The Musical” and “The Wizard of Oz.” Recently, we have licensed multiple songs for each of the theatrical productions “Ain’t Too Proud: The Life and Times of The Temptations,” “Tina: The Tina Turner Musical,” and the upcoming musical scheduled to premiere on Broadway in February 2022, “MJ: The Musical,” featuring the songs of Michael Jackson. These productions have also infused new life and generated renewed interest in the songs that we have licensed.

E. SMP's Role in Protecting Copyrights in Musical Works And Ensuring Songwriters Get Paid

50. Music publishers like SMP also invest considerable time, money and expertise in performing vital administrative services for songwriters, many of which would be too costly and time consuming for songwriters to perform on their own. This includes collecting and verifying royalty payments from tens of thousands of licensees, and protecting the copyrights in their songs. These services are fundamental to songwriters' livelihoods and, ultimately, to supporting the ecosystem of the music industry.

51. As I discussed in my previous witness statement, our administrative role begins with our accurate registration of all of our songwriters' works in our worldwide internal database called "TEMPO," with the U.S. Copyright Office, the U.S. PROs, international PROs and other collective rights management organizations ("CMOs") and, now, with The MLC. This ensures that all songs are properly licensed, including through compulsory licensing schemes, where applicable, and all uses are paid for. Our Copyright Department performs these essential functions and, more generally, manages and monitors all of our copyrights. This is no small task, as we have almost [REDACTED] songs in our catalog.

52. Registering our songwriters' works is a prerequisite to other significant administrative obligations of a music publisher: the tracking, collecting, auditing and paying of royalties owed to songwriters for the use of their works. This is a complex yet essential role, requiring significant capital and human resources. Together, our Copyright and Royalty Administration Department is comprised of approximately [REDACTED] employees worldwide, including approximately [REDACTED] in the United States.

53. As I noted in my last statement, SMP has invested in numerous systems and procedures which enable us to administer and make available the very large catalogs for licensing by platforms, drastically reducing their transaction costs, while also ensuring that our songwriters get paid appropriately. Part of this investment has included the building and maintenance of TEMPO, our proprietary copyright and royalty system referenced above. Since creating TEMPO in 2007, SMP has invested approximately [REDACTED] to build and upgrade the system, approximately [REDACTED] of which has been invested since my last statement in 2016. Some of the upgrades to TEMPO were necessitated by the growth of interactive streaming, with its complex royalty formulae and the resulting micro-penny payments it generates. Additionally, we have built and maintained a state-of-the art royalty portal called SCORE, which provides our songwriters with a database of royalties information and analyses from approximately 96,000 income sources globally. In recent years, we have enhanced SCORE's capabilities to provide to our songwriters the most comprehensive data available, have created a mobile app, and have added certain payment options, such as the ability for a songwriter to request some or all of his or her current royalty balance to be paid immediately, instead of having to wait until the next distribution.

54. Finally, as addressed in my *Phonorecords III* statement, SMP also undertakes the critical task of protecting the value of our songwriters' works. We accomplish this by representing their interests in copyright infringement actions, other cases that present important issues of copyright law and, of course, proceedings such as this one to determine royalty rates. For example, since my *Phonorecords III* statement, it has been a focus of ours—at a significant cost—to fight Internet service providers, including Cox and Brighthouse, who facilitate copyright infringement through toothless terms of service and

repeat infringer policies, and we have been successful in that area. We also successfully litigated against an infringing concert streaming service, Wolfgang's Vault. From 2017 to date, SMP has spent over [REDACTED] in outside counsel fees to enforce our copyrights through litigation. And we have continued to monitor internet infringement and serve takedown notices under the Digital Millennium Copyright Act. I note that these activities are also to the benefit of licensed and compliant digital services, as we are preventing unfair competition with their platforms.

55. In conclusion, the role that music publishers play in the financing, creation, dissemination and protection of the value of copyrighted songs is both significant and manifold. Our enduring efforts to discover, support, develop, promote and protect songwriters are both the primary focus of our business and an essential aspect of the entire music industry, including the digital streaming sector, as discussed further in the next section.

III. MUSIC PUBLISHERS PROVIDE SIGNIFICANT VALUE TO ELIGIBLE SERVICES AND THEIR USERS

56. As I testified in the *Phonorecords III* proceeding (Brotsky P3 WDT ¶ 8), without musical works or “songs,” there would be nothing for musicians to record or for artists to perform, and no recordings for record labels to release. Without songs, the companies that operate Eligible Services would have no content to offer to music fans and on which to build their customer bases and increase their enterprise values and, in truth, there would be no Eligible Services. The old adage, “It all begins with a song,” is truer today than ever, as much of the music industry—and an increasing portion of the tech industry—derives its value from the unique and irreplaceable creativity of songwriters. The value that music publishers—who, as demonstrated above, play a critical role in the

creation and promotion of copyrighted songs—provide to the Eligible Services, *whose product is these songs*, is evident.

57. Moreover, and as I also testified in *Phonorecords III* (*id.* ¶¶ 52-54), since 2012, and subsequent to the settlement of the *Phonorecords II* rate proceeding, the music industry has undergone an enormous change. Digital services, and in particular Eligible Services, have become the primary means by which consumers access and consume music. According to recent RIAA data, streaming services (including on-demand subscription services, ad-supported services, and non-interactive services) accounted for nearly 80% of all recorded music revenue in 2019.³ This is further verified by [REDACTED]

[REDACTED]. As Mr. Kelly points out, part of the dramatic increase in the percent of mechanical income attributable to interactive audio streaming is due to its growth, but a very significant part of that percentage is also due to [REDACTED]

58. The ability to play virtually any song is of great value to consumers, and vigorously promoted by Eligible Services. For example, Amazon promotes “[u]nlimited access to 70 million songs,” which can be listened to “anywhere” (but “better with

³ See COEX-2.3 (Sarah Perez, *Streaming services accounted for nearly 80 percent of all music revenue in 2019*, Tech Crunch (Feb. 26, 2020), <https://techcrunch.com/2020/02/26/streaming-services-accounted-for-nearly-80-of-all-music-revenue-in-2019/>, citing to RIAA data).

[Amazon’s virtual assistant technology] Alexa” for “hands-free listening”).⁴ Apple promotes the ability to “[p]lay over 75 million songs . . . across all of your devices.”⁵ Spotify touts “unlimited high-quality streaming access to over 50 million songs” on its Premium subscription service, and the ability to play such songs “anywhere—even offline.”⁶ The growth in paid subscriptions to Eligible Services demonstrates that consumers have paid and are willing to pay for that value. Similarly, advertisers have paid and are willing to pay for the privilege of pitching their wares to consumers using these services.

59. The ability to offer virtually every song is also of great value to the companies that offer Eligible Services. Not only do such companies earn revenue from the sales of subscriptions to such services, but many also use the value of “any song from any device” to sell their own smart phones, smart speakers or other internet-enabled devices, such as Amazon’s Echo, Google’s Home, or Apple’s HomePod. In fact, some companies offer a discount to the price of a subscription to an Eligible Service to consumers who purchase the company’s internet-enabled device.⁷ The copyrighted music is used as the lure to sell the hardware.

⁴ See COEX-2.5 (Amazon Music Unlimited, <https://www.amazon.com/music/unlimited>).

⁵ See COEX-2.6 (Apple Music, <https://www.apple.com/apple-music/>).

⁶ See COEX-2.4 (Spotify Premium, <https://support.spotify.com/us/article/spotify-premium/>).

⁷ Amazon, for example, discounts its Unlimited full-catalog subscription streaming service to \$3.99 for use on its Echo smart speaker or Fire TV media player. See COEX-2.7 (Amazon Music Unlimited Single Device Plan, <https://www.amazon.com/music/unlimited/echo>).

60. Of course, for an Eligible Service to offer and for a user of an Eligible Service to have access to virtually any song, the Eligible Service needs to license the rights to virtually all songs, and those rights are in most cases owned or administered by music publishers, who, as discussed above, spend significant resources building valuable song catalogs and helping to create (and financing the creation of) new and unique songs. The catalogs of popular songs and the new, unique songs licensed by publishers are an indispensable and extremely valuable component of Eligible Services and asset to the companies that offer such services, and their ability to offer (and to profit, including in other product lines, now or in the future from) all of this music would not be possible without the contributions of publishers and their songwriters.

IV. THE COPYRIGHT OWNERS' PROPOSED RATES AND TERMS EASILY MEET, AND MAY UNDERSTATE, THE RATES AND TERMS THAT WOULD BE NEGOTIATED IN THE MARKETPLACE BETWEEN A WILLING BUYER AND WILLING SELLER

A. The Changes in the Marketplace and the Rate Standard Indicate that the Rates Should Increase From the *Phonorecords III* Rates

61. As I explained in my witness statement in the *Phonorecords III* proceeding (Brodsky P3 WDT ¶¶ 56-73; 77-80), the experimental *Phonorecords II* rates and terms ultimately proved inadequate to compensate publishers and songwriters for the value they contribute to Eligible Services and their customers. As I read the public version of the Board's Final Determination in *Phonorecords III*, the Board agreed, as it found the rates in the *Phonorecords II* settlement to be too low, and that an increase from those rates was needed to ensure the continued viability of the songwriting profession. Nevertheless, given the D.C. Circuit Court's determination and the remand, music publishers and songwriters

are in the unenviable position of not knowing for certain what they will be paid for uses of their works by Eligible Services that have already occurred over the last several years.

62. Nonetheless, I believe that the rates and terms determined by the Board in the Final Determination should be the point from which the Board *starts* in determining rates and terms for the *next* five years in this proceeding, and that the evidence shows that the rates should be increased from the Final Determination Rates for several reasons.

63. First, the *Phonorecords III* proceeding was governed by a different rate standard than the current proceeding. SMP has always believed that the Section 801(b) standard that governed *Phonorecords III* suppresses rates below what could be achieved under the new “willing buyer/willing seller” standard that has long existed for sound recording licensors under Sections 114 and 112, which is why we supported the Music Modernization Act’s change to the new standard. The Copyright Owners’ proposed rates and terms, in my view, better reflect rates and terms that would be negotiated between a willing buyer and a willing seller.

64. Second, the current market conditions are not only vastly different from the market conditions that existed at the time of the *Phonorecords I* and *II* settlements, when the digital music marketplace was dominated by iTunes and by the sale of digital downloads, and interactive streaming was economically insignificant,⁸ they are different from the market conditions in 2016, when I testified in *Phonorecords III*. As noted above, interactive streaming now [REDACTED] And the

⁸ The fact that streaming was, at the time of the *Phonorecords I* and *II* settlements, economically insignificant was why we chose to settle those rates with DiMA, choosing to expend our resources litigating the then-Subpart A rates for digital downloads and physical products, which were at those times the dominant products in the marketplace.

market is now dominated by trillion-dollar, multi-product, multi-service technology giants (in particular, Apple and Amazon, which had not even materially entered the market until, respectively, 2015 and 2016). Indeed, Amazon Music Unlimited and Google’s YouTube Music/Premium are now the fastest-growing streaming subscription services.⁹

65. These companies use the lure of discounted music to generate revenue in other product lines. Amazon gives away Amazon Prime Music and offers Amazon Music Unlimited (“AMU”) at significant discounts to Amazon Prime delivery service subscribers to entice users to purchase the Prime delivery service and to then sell those Prime users other products. Amazon also uses AMU to sell its Echo hand-free, voice-controlled speakers, significantly discounting the music service for purchasers of an Echo.¹⁰ Apple uses its streaming service to acquire customers and to lock them into its ecosystem in order to sell them iPhones, apps, service bundles, and other non-music products. Google offers three to six free months of access to its YouTube Premium service to purchasers of a Google Home or Google Nest.¹¹ Indeed, even what were previously “pure-play” services like Spotify have now become diversified companies that use our music—which created their entire customer base—to generate revenues from that customer base in other business lines (such as podcasts). But music publishers and songwriters do not share in any of this “ancillary” revenue, which is not included in Service Revenue used to calculate mechanical

⁹ See COEX-2.8 (Anna Nicalaou, *Amazon becomes fastest-growing music streaming service*, Financial Times (July 11, 2019), <https://www.ft.com/content/60633178-a282-11e9-974c-ad1c6ab5efd1>); COEX-2.9 (Goldman Sachs, *Music in the Air* (April 26, 2021)) at 8.

¹⁰ See n.7, *supra*.

¹¹ See COEX-2.10 (Nest + YouTube Premium, <https://www.youtube.com/yt/terms/ytpr-nest/>); COEX-2.11 (YouTube Premium – 6 months free offer, <https://support.google.com/googlenest/thread/533340/youtube-premium-6-months-free-offer?hl=en>).

royalties under the relevant regulations. In fact, this revenue has been and remains entirely opaque to SMP and other rights owners, including when we negotiate rates and terms with Eligible Services.¹²

66. That these companies are massively discounting their music services in order to acquire market share and customers with long-term value (to grow revenue in other product lines, or to increase share price), rather than seeking to maximize revenue from those music services (which revenue is required to be shared with compulsory copyright owner licensors) is demonstrated by the declining average revenue per user these companies receive from their discounted music services. As discussed further in Thomas Kelly’s statement (at ¶ 86), the average revenue per user for each of the Service Participants is [REDACTED]. And the Services have not raised their price in the U.S. in over a decade, which means that it has over time been significantly eroded by inflation. The Services have no incentive to optimize the end user price while in competition with each other for the market.

67. It is also demonstrated by the fact that Spotify now engages in such significant discounting that [REDACTED]

[REDACTED]

[REDACTED]

¹² Were we negotiating with the Service Participants in a free market outside of the shadow of the compulsory license, and if we knew how much they were actually making from the use of our music, including in their other product lines, the rates that we could negotiate would be much greater than those we could negotiate without that information.

[REDACTED]¹³

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴

68. In fact, as a result of the Service Participants’ discounting and pricing strategies designed to maximize their long-term customer acquisition value, create scale, compete with each other for customers, and sell other non-music products and services—rather than to maximize revenues attributable to their music streaming services on which they would have to pay royalties to publishers and songwriters—

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵

¹³ See Final Determination, 84 Fed. Reg. 1,918, at 1,958 (the “evidence points strongly to the need to increase royalty rates to ensure the continued viability of songwriting as a profession”).

¹⁴ See COEX-2.12 (Jem Aswad, *Spotify Determines That It Overpaid Publishers in 2018, Requests Refund*, Variety (June 21, 2019), <https://variety.com/2019/biz/news/spotify-determines-that-it-overpaid-publishers-in-2018-requests-refund-1203250260>); CO-EX-2.13 (Elizabeth Aubrey, *Spotify are trying to claim back millions from publishers in new royalties row*, NME (June 24, 2019), <https://www.nme.com/news/spotify-says-overpaid-songwriters-publishers-now-want-money-back-2513612>).

¹⁵ As reported to me by SMP’s royalty department, and based on the Service Revenue and Play information reported by Spotify in its statements to SMP and calculated by dividing total royalty payments by total Plays,

[REDACTED]

69. In sum, SMP would never have agreed to the *Phonorecords II* rates and rate structure—with a low and illusory revenue prong, and “capped” TCC and per-subscriber prongs insufficient to protect against revenue diminution and displacement caused by rampant discounting—had we known that the streaming services would come to be operated by giant technology companies that would use our music to drive revenue elsewhere in their ecosystems and to other business lines.¹⁶

B. Voluntary Agreements with Eligible Services Demonstrate a Willingness and Ability to Pay Royalties Higher Than the *Phonorecords III* Rates

70. I understand that the Services in *Phonorecords III* also pointed to direct licenses made between publishers and Eligible Services which embodied the statutory rate as additional “benchmarks” supporting the *Phonorecords II* rates and terms. For the reasons discussed in my *Phonorecords III* statement (Brotsky P3 WDT at ¶¶ 82-86), I do not believe agreements embodying the existing statutory rate are appropriate benchmarks for determining the statutory rate, and I believe that even more emphatically now that the willing buyer/willing seller rate standard governs this proceeding.

71. Direct licenses for activity covered by Section 115 are made in the shadow of the compulsory license. Thus, publishers like SMP are not willing sellers in this space.

¹⁶ The royalty reporting by Eligible Services under the *Phonorecords II* rates and terms has also been inscrutable. [REDACTED]

[REDACTED] To ensure accurate and transparent royalty accounting, and to enable copyright owners to analyze the effect of the services’ discounting, Eligible Services should be required to separately account and calculate royalties for each distinct product that they offer, including family plans, student plans, device plans, bundles, and the like.

We are compelled sellers, obligated to sell at the rates determined in these proceedings. It is difficult if not impossible to get someone to pay more for something than they have to, and thus, if an Eligible Service does not like a deal we are proposing, it can just obtain the compulsory license. Thus, for covered activity, the statutory rate acts as a ceiling on what the copyright owners can obtain in a negotiation.

72. That said, the direct licenses we make for activity covered by Section 115 are [REDACTED]¹⁷ [REDACTED]

[REDACTED]
[REDACTED]

Thus, these agreements do not show any preference for the *Phonorecords II* rates (or for the *Phonorecords III* rates for that matter).

73. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸

¹⁷ Although, in most of our deals, [REDACTED]
[REDACTED]
[REDACTED]

¹⁸ Note that when we make direct deals with Eligible Services and deals with other digital services for rights that are not subject to compulsory license (many of which are discussed below), they are generally for a short time period, usually [REDACTED]. Particularly given that the digital music market is rapidly changing, we would not make a deal that locks us in to rates and terms for a period of five

74. For example, we made two agreements [REDACTED]

[REDACTED]¹⁹ [REDACTED]

[REDACTED]²⁰ [REDACTED]

[REDACTED]²¹ [REDACTED]

years or greater. We keep the term short precisely to afford the parties flexibility to adjust to changed market conditions. Were a prospective digital licensee to demand a term [REDACTED], we would only consider making such a license if the licensee paid us some sort of a risk premium.

¹⁹ See COEX-2.14 [REDACTED]

[REDACTED] COEX-2.15 [REDACTED]

[REDACTED] As was the case with all of the Eligible Services with whom we made deals prior to November 2018, we made two agreements, one covering Sony/ATV Music Publishing (“SATV”) compositions and one covering the compositions of EMI Music Publishing (“EMI”), the rights to which SATV exclusively administered prior to November 2018. But [REDACTED]. In November 2018, SATV and EMI were combined, and thereafter SMP became the sole licensor of both the SATV and the EMI compositions.

²⁰ See COEX-2.14; COEX-2.15.

²¹ See COEX-2.14; COEX-2.15.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²²

75. Our agreements [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² See COEX-2.14; COEX-2.15.

[REDACTED]

See COEX-2.14; COEX-2.15.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁴

76. Our Amendments to our agreements made with [REDACTED]

[REDACTED]

²³ See COEX-2.16 [REDACTED]

[REDACTED] COEX-2.17 [REDACTED]

²⁴ See COEX-2.16; COEX-2.17. [REDACTED]

[REDACTED] See COEX-2.16; COEX-2.17.

[REDACTED]

[REDACTED]²⁵

77. [REDACTED]

[REDACTED]

[REDACTED]

²⁵ See COEX-2.20 [REDACTED] at Am. No. 4 [REDACTED]
[REDACTED]
[REDACTED] *id.* at Am. 6 [REDACTED]
[REDACTED]
[REDACTED] COEX-2.21 [REDACTED]
[REDACTED] COEX-2.22 [REDACTED]
[REDACTED]
[REDACTED] COEX-2.23 [REDACTED]
[REDACTED] COEX-2.18 [REDACTED]
[REDACTED]
[REDACTED] COEX-2.19 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁶

78. As discussed in my *Phonorecords III* statement (Brodsky P3 WDT ¶ 89),

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁶ See COEX-2.18; COEX-2.19.

[REDACTED]

²⁷ See COEX-2.24

[REDACTED] COEX-2.25

[REDACTED]

[REDACTED]

[REDACTED]²⁸ [REDACTED]

[REDACTED]²⁹

C. Voluntary Licenses for Interactive Streaming Services Negotiated Outside of the Shadow of the Compulsory License Support the Copyright Owners' Rate Proposal

79. I believe that the digital deals we have made outside of the shadow of the compulsory license more closely reflect rates and terms that would be agreed to between a willing buyer and a willing seller that is unconstrained by a statute compelling that seller to license its property at a rate set by the government.

i. Blanket Licenses for Interactive Audiovisual Streaming Services

80. In fact, I believe that one category of non-compulsory deals is particularly relevant to this proceeding: blanket licenses to reproduce and distribute our entire catalog on and via an interactive audiovisual streaming service. By these agreements, just as we do in our blanket license agreements with Eligible Services, we grant to the streaming service the right to reproduce and distribute all or virtually all of the songs in our catalog, as embodied in audiovisual works, on an “on-demand” basis to subscribers or other users

²⁸ See COEX-2.24; COEX-2.25. By no means am I suggesting that \$9.99 is the appropriate retail price for a premium, on-demand music subscription service, or that Eligible Services cannot or should not charge more, or that the Board should in this proceeding base a per-subscriber fee or any other rate provision on a retail price of \$9.99. All of these negotiations exist under the ceiling of the compulsory rate for us. We negotiate with the compulsory rate sitting on the table, and the result never reflects a true willing buyer/willing seller outcome.

²⁹ See COEX-2.24; COEX-2.25. By an amendment, [REDACTED]

[REDACTED]

of the streaming service. For the reasons discussed below, these agreements are, in my view, at a minimum, illustrative of the relative value assigned to sound recordings and musical works by licensees operating outside of the context of the compulsory license, and are thus useful benchmarks in determining both a percentage of revenue rate and a TCC rate in this proceeding. They also serve as useful benchmarks in determining a per-subscriber minimum and certain other terms.

81. While I understand that the Services argued against the use of such agreements as benchmarks in the *Phonorecords III* proceeding, equating them to synchronization licenses such as those that we make with movie or television producers or commercial advertisers, that is an inapt comparison. In the context of sync licenses for film or television, the licensee is seeking to use a particular musical work and, in some cases, a particular sound recording (to, e.g., convey a mood, or to support a theme). In those contexts, it is true that a producer that wishes to use the musical work may have the option to use any number of different sound recordings embodying the musical work, or to create its own “cover” recording of the musical work, theoretically giving the musical work copyright owner greater bargaining power in relation to the sound recording copyright owner. (Although, to be clear, the producer also has the option to use a different musical work.) By comparison, each of these audiovisual streaming services, including those described below, like the Eligible Services in this proceeding, requires a blanket license for our entire catalog (and blanket licenses from record labels) so that it may stream to its users on-demand *any* sound recording on its platform that embodies an SMP musical

work.³⁰ That those sound recordings may themselves be embodied in an audiovisual file rather than an audio-only file does not change the blanket nature of the license, or the relative value of the sound recording to the musical work. Indeed, SMP views the Eligible Service market as a subset of the interactive streaming market that includes both Eligible Services and interactive audiovisual streaming services.³¹ And, in this market, unlike in the market for film and television synchronization licenses, the sound recordings and musical works are complements, not competitors. We and the record company are each licensing an intellectual property right to a third party that needs both rights, and neither right is subject to a compulsory license that serves to depress the rate obtainable by the licensor. By virtue of a historical quirk, the right to reproduce our works in phonorecords, which are expressly defined to exclude audiovisual works, is subject to compulsory license at rates set by the government, while the right to reproduce our works in audiovisual works can be licensed by us in the free market.

82. In my *Phonorecords III* testimony (Brodsky P3 WDT ¶¶ 97-98), I described some blanket license agreements we made with audiovisual streaming services that required licenses both from us and from record companies, and where we were paid at the same royalty rate or were paid the same fee as the record companies,³² including [REDACTED]

³⁰ Some of these services do not even themselves choose which audiovisual or audio-only recordings will be offered on its platform—such decision is made by the users of the platform (i.e., such platform offers “user-generated content” or “UGC”), or by another individual (such as an instructor featured in the video).

³¹ Consistent with this fact, our blanket audiovisual streaming licenses, like our licenses with Eligible Services, are negotiated by me and the teams that I oversee. Synchronization licenses for film and television are negotiated and issued by SMP’s Synchronization Department, discussed above.

³² This is generally accomplished through a “most favored nations” (“MFN”) provision or a representation and warranty that we will be paid the same as the labels. [REDACTED]

[REDACTED]. Since *Phonorecords III*, we have continued to enter into these types of agreements.

83. For example, we made a deal with [REDACTED]

[REDACTED]³³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

84. By our agreement with [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

³³ See COEX-2.26 [REDACTED]
[REDACTED]

³⁴ See CO EX-2.28 [REDACTED]
[REDACTED]

[REDACTED] 35 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 36 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 37 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁵ In this Agreement, [REDACTED]

³⁶ To the extent that our deals in this space [REDACTED]

³⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁸ Our ability to negotiate such a most favored nation provision demonstrates that licensees negotiating in a free market consider the musical works to have the same value as the sound recordings.

85. Our blanket license agreement with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁸ *Id.*

³⁹ *See* COEX-2.30 [REDACTED]

[REDACTED]

⁴⁰ [REDACTED]

[REDACTED]⁴¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

86. We entered into an agreement in August 2020 with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴² [REDACTED]

⁴⁰ *See id.* [REDACTED]
[REDACTED]

⁴¹ *See id.* The difference between the latter and the former rates and structure reflects both that the use of the music in [REDACTED]
[REDACTED]
[REDACTED]

⁴² *See* COEX-2.31 [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

⁴³ *See id.*

87.

44

(See

Brodsky P3 WDT ¶ 107.)⁴⁵

⁴⁴ See COEX-2.16; COEX-2.17.

See COEX-2.16; COEX-2.17. While the Agreement provides

See COEX-

2.16; COEX-2.17.

⁴⁵ Under the terms of our

ii. Blanket Licenses for Other Digital Services

88. As I testified in *Phonorecords III* (Brodsky P3 WDT ¶¶ 99-104), in situations where the digital service does not need to obtain sound recording licenses—e.g., lyric licenses, guitar tablature licenses, or digital karaoke licenses (where the karaoke company records its own masters)—we usually receive [REDACTED] [REDACTED] and that has continued during the period since *Phonorecords III*. Indeed, in many cases, we receive closer to [REDACTED] of revenue.

89. For example, pursuant to the terms of our blanket license agreement with Ultimate Guitar granting Ultimate Guitar the right to stream [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁶ Per our agreement with

Fender Digital granting Fender Digital [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See COEX-2.16; COEX-2.17.

⁴⁶ See, e.g., COEX-2.29 [REDACTED]

[REDACTED]

[REDACTED]⁴⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

V. CONCLUSION

90. As demonstrated above, SMP and other music publishers play an indispensable role in the creation and promotion of the songs without which Eligible Services, including those offered by the Service Participants, could not exist. These songs have great value to both the Services and the end consumers.

91. The rates paid by the Service Participants and other Eligible Services remain low, even at the *Phonorecords III* rates and terms, because of the Services' discounting strategies. And interactive streaming has substituted for the sale of physical phonorecords and digital downloads, and has not promoted SMP's other streams of revenue from our musical works. Because the vast amount of the revenue earned from the interactive streaming service is paid to our songwriters, setting the right rates is not only about protecting SMP's business interests, it is as much if not more about ensuring that songwriters can earn a fair income, and that music publishers can continue to pay advances to and take risks on songwriters. SMP is a songwriter-focused company, and there are real

⁴⁷ See COEX-2.27 [REDACTED]
[REDACTED]

people behind these songs who need to be properly paid for the use of their music by these Services.

92. Finally, I believe that in light of the agreements discussed above that we have made in the free market for rights not subject to the U.S. statutory compulsory license, the Copyright Owners' proposed rates and terms easily meet (and may actually understate) the rates and terms that would be negotiated in the marketplace between a willing buyer and a willing seller where both parties had access to all relevant information. For all of these reasons, I urge the Judges to adopt the Copyright Owners' proposed rates and terms.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 13, 2021

A handwritten signature in black ink, appearing to read "Peter Brodsky", written above a horizontal line.

Peter Brodsky

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21–CRB–0001–PR (2023–2027)

WRITTEN DIRECT TESTIMONY OF TIMOTHY COHAN

Introduction and Professional Background

1. My name is Timothy Cohan. I am the Chief Counsel of peermusic.
2. My career in the music industry has spanned over two decades. I first joined peermusic as a legal assistant from 1997 to 2001. After earning my law degree from Columbia Law School, I returned to peermusic in 2011 as in-house counsel. Since that time, I have been responsible for overseeing all legal and corporate matters for peermusic’s domestic companies and negotiating peermusic’s direct agreements with digital services in the United States. In my current role as Chief Counsel, a title I have held since March 2020, I also participate in government relations and public policy matters for all of peermusic’s global companies. I am a founding board member of the Mechanical Licensing Collective and have previously served as a board member of the Association of Independent Music Publishers.
3. I make this statement to describe (i) the important role played by independent music publishers, such as peermusic, in the creation and dissemination of music; (ii) the considerable risk and various costs and expenses incurred by peermusic in fulfilling that role, including the contributions and investments it has made; and (iii) various license agreements that peermusic has

entered into with interactive streaming and limited download services (“Eligible Services”) for rights covered by the Section 115 compulsory license, as well as with other digital music services for rights that are not subject to the compulsory license.

Peermusic

4. Peermusic is a family-owned and operated, independent music publisher. Peermusic was founded in 1928 as Southern Music Publishing Company, Inc. by Ralph S. Peer. Since the company’s founding, it has been influential in promoting R&B, Jazz, Latin and Country music from the beginning of the recorded music era, and has been actively involved in developing Rock and Roll, Rockabilly and Pop music from their inception.

5. Today, peermusic is the largest privately-owned independent music publisher in the world, owning and/or administering an interest in [REDACTED] musical compositions worldwide, and nearly [REDACTED] musical compositions in the United States, across an array of musical genres. Peermusic has 34 offices in 29 countries.

6. Peermusic’s longstanding success owes not just to its impressive heritage catalog, but also to its continued cultivation of contemporary songwriters across the creative spectrum. Peermusic’s songwriters have penned both genre-defining classics and modern hits, such as “Georgia On My Mind,” “You Are My Sunshine,” “Stardust,” “Bésame Mucho,” “Mambo #5,” “Not Fade Away,” “Old Time Rock and Roll,” “Peggy Sue,” “Walk Like An Egyptian,” “Ring My Bell,” “Come On Over Baby,” “Me Against The Music,” “Firework,” “Umbrella,” “You Raise Me Up,” “Somewhere On A Beach,” “Single Ladies (Put A Ring On It),” “Yummy” and “Jealous.” Peermusic owns or administers songs written by legendary songwriters such as Hoagy Carmichael, The Carter Family, Jimmy Davis, Donovan, David Foster, Blind Willie McTell, Tito Puente, and Earl Scruggs, and great American classical composers such as Charles Ives, Lou Harrison and

Morten Lauridsen. Peermusic's current roster includes current and future hitmakers such as apl.de.ap (of The Black Eyed Peas), Ayo & Teo, Junior Cabal, Gaby Moreno, and Justin Weaver.

7. Since its founding, peermusic has been a pioneer in generating interest in the United States in different (usually international) musical genres. For example, the company has throughout its history been on the forefront in bringing Latin music to a U.S. audience. Starting in the 1930's, Ralph Peer championed Latin music by publishing the seminal works of legendary Latin songwriters such as Agustín Lara (writer of "Granada" and "Maria Bonita"), Pérez Prado (writer of "Mambo No. 5"), and Consuelo Velázquez (writer of "Bésame Mucho"), and placing several Latin songs in American films produced by Disney and MGM as early as the 1940s. Over the decades, peermusic has remained a standard-bearer of Latin music amongst music publishers, including by publishing songs of Buena Vista Social Club, whose 1996 album is generally considered one of the most influential albums of the Latin music genre, having sparked a renewed interest in Latin music from audiences around the world. Peermusic's influence on Latin music in the U.S. perfectly encapsulates the significant—yet often unsung—role independent music publishers have in bringing not only songs, but groundbreaking musical genres, to the masses. Independent music publishers like peermusic are often trailblazers who take risks on music that might never become profitable "hits," but that nevertheless enriches and diversifies the U.S. musical landscape, including the type of music available on interactive streaming services.

8. Despite its over 90-year history, peermusic remains a family-run and owned business. Today, it is led by Mary Megan Peer, the founder's granddaughter, who serves as Chief Executive Officer. Her father, Ralph Peer II, is peermusic's Executive Chair.

The Role of Independent Music Publishers

9. All music publishers play an indispensable role in making tens of millions of musical works available for the public's enjoyment and consumption. In this regard, independent music publishers play perhaps an outsized role compared to the major music publishers, as is reflected by that fact that many of today's chart-topping hits and award-winning songs are penned by songwriters who are signed with independent music publishers. Just to name but a few examples, in the last two years alone, peermusic songwriters have written numerous platinum songs like "Intentions" and "Yummy," co-written by Poo Bear and recorded by Justin Bieber, and Grammy award winning and nominated songs, such as "Black Parade," co-written by Rickie "Caso" Tice and recorded by Beyoncé, and "The Box," co-written by Larrance Dopson and recorded by Roddy Ricch.

10. Peermusic represents approximately [REDACTED] "clients," which include active and inactive songwriters, and heirs, estates, and assignees of songwriters. From 2016 through 2020, we added over [REDACTED] new songs to our U.S. catalog. Our A&R team, comprised of [REDACTED] A&R employees located in the U.S. and another [REDACTED] A&R employees located across various offices abroad, are primarily responsible for identifying talented new songwriters with whom we would like to work.

11. Although it is generally understood that independent music publishers sign fewer songwriters each year than the major publishers, this means that we are incredibly selective when choosing the songwriters we work with, and that we are able to develop strong partnerships with each active writer in our roster. We operate with a low ratio of songwriters to creative employees so that we can provide high-quality, personalized service to each of our writers throughout the entire period of our relationship.

12. Before we sign a songwriter, our A&R team extensively evaluates the writer's potential to have both a strong career as a writer and a long-term relationship with peermusic. And, given the importance of synchronization ("sync") opportunities, our Sync Department is as active and involved in songwriter signings as our traditional A&R employees. Each deal we sign receives the attention and care of people at all levels of the company, including the Peer family, and we only sign songwriters when several members of our creative staff are excited about the writer and supportive of an ongoing partnership with him or her. With respect to the agreements we negotiate with each songwriter, we offer flexible and sometimes bespoke terms tailored to each client's needs and circumstances. Some of the songwriters we signed in the last few years (with some of the hit songs they helped write in parentheses) include: Poo Bear ("What Do You Mean," "Caught Up," "Despacito (Remix)"); Larrance Dopson ("The Box," "Love Looks Better"); Sasha Sirota ("Yummy," "The Woods"); and Brandon Kinney ("Love You Too Late," "Ain't Always The Cowboy").

13. Once a songwriter is signed with peermusic, we work hand in hand with the writer to help the writer reach his or her full potential as a commercially successful songwriter. No two songwriters are the same, and thus, for peermusic, there is no one-size-fits-all approach to providing service to our writers. Rather, we offer an array of services and support mechanisms to meet each songwriter's style, needs and interests. And in doing so, we invest substantial resources into each stage of our partnership with our writers.

14. We provide tools and resources to help our writers at every stage in their careers, including to develop their songwriting skills. Our songwriters have access to writing rooms in our Nashville, Miami and Los Angeles offices. This resource is particularly important to our songwriters based in Nashville, who utilize the writing rooms five days a week, from 9 to 5. We

provide our songwriters with access to state-of-the-art recording studios in our Miami, Nashville and Los Angeles offices as well, all free of charge to our roster of songwriters. Our 1,300 square foot Miami studio is particularly well-regarded in the industry. Like our Nashville writing rooms, our Los Angeles studios are utilized almost daily by some of our clients, such as producer-songwriter Christoffer Semelius. Christoffer has produced numerous K-Pop hits at peermusic's Los Angeles studios, including "Ready To Love," recorded by Seventeen; "My Treasure," recorded by Treasure; and "Better Days," recorded by SuperM.

15. Depending on each songwriter's talents, commercial potential and career goals, a combination of peermusic A&R and synchronization professionals with many decades of collective experience is established around the writer to provide creative counseling and support, working closely with the songwriter to assist in his or her creative process. Our creative teams help guide a song's creation, and offer advice on how to refine a song so that it is just right for the current moment in time or the project at hand.

16. One way we assist our songwriters in the creative process is by identifying opportunities for them to collaborate with other writers and producers with whom we have relationships—both within and outside the peermusic roster. Such collaborations often result in the creation of great songs that might not have been created by either songwriter on his or her own. For example, peermusic's A&R team recently worked with multi-platinum singer-songwriter Clay Walker—who often writes solo—to arrange all ten of the songwriting collaborations on Clay's latest album, "Texas to Tennessee." Similarly, a majority of the songs on Lupita Infante's Grammy-nominated album, "La Serenata," were the product of co-writing sessions our A&R team lined up for Lupita. Our A&R team also arranged songwriting sessions between Michael Tyler, Lalo Guzman and Breland—whom Michael and Lalo had not worked with previously—which

resulted in the creation of the song “I Don’t Smoke.” The song was cut and released in 2021 by the up-and-coming artist Lily Rose.

17. In our collaborative arrangements, we sometimes pair veteran songwriters together with newer songwriters so that the less experienced writer can receive mentorship from a peermusic writer who has built a sustainable career as a songwriter. Our A&R team has also brought together renowned songwriter Poo Bear and Spanish-language lyricist Joel “Genio” Vazquez Reyes, who have worked on several Spanish-language projects together. This has helped Poo Bear break into a new market and has brought a new level of commercial success to Genio.

18. In addition to identifying and arranging potentially successful songwriting teams, our creative staff assists in these collaborative ventures by offering advice and instruction regarding the lyrical, tonal, thematic, and sonic elements of the songs being created. For example, peermusic Nashville’s Senior Vice President, Michael Knox, recently arranged a collaboration between Micah Wilshire, Michael Tyler and Thomas Archer for [REDACTED]

[REDACTED]. As a result, the songwriting team in their very first session together wrote the song [REDACTED]

[REDACTED]. Similarly, the very first session our A&R team arranged for first-time collaborators [REDACTED] which is slated to be released on [REDACTED].

19. We also create opportunities for collaboration by, among other things, hosting multiday songwriting camps, where our writers work in small groups (including with writers outside of peermusic) to create songs for a particular recording artist, musical genre or project. For example, most of the songs on Chiquis Rivera’s Grammy-winning album “Playlist” were the

result of songwriting camps peermusic's A&R team arranged for the singer-songwriter in Los Angeles and Miami.

20. We arrange for these collaborative opportunities in locations around the world and handle all logistical aspects of scheduling songwriting sessions and camps around many people's schedules (including, for example, not only the songwriters, but their managers). For our songwriters, we typically cover [REDACTED] of the costs associated with these opportunities, and all studio time is paid for by peermusic.

21. Our creative teams also work closely with our songwriters to create opportunities for their songs to be heard by as many people as possible, including by introducing our writers to recording artists, record labels, managers and other influential stakeholders in the music business, and placing their songs in recorded music and other projects. As noted, our Miami, Nashville and Los Angeles offices have recording facilities in which our songwriters can create professional masters of their songs. We can then use those masters to help promote their works for placement, or, for singer-songwriters, to help them secure next-level management, producer collaborations and recording artist agreements. For example, our A&R team introduced producer-songwriter Dave Hamelin to Beyoncé's creative circle and provided him with the financial and creative resources he needed to develop from a Canadian rock producer to a pop producer. As a result, Dave is now one of Beyoncé's main producers, [REDACTED]. Similarly, one of our A&R executives helped the songwriting duo S.O.S. secure management with Roc Nation.

22. We also have a team of [REDACTED] employees in the U.S. dedicated to placing our songwriters' works in film, television, advertising productions and other audiovisual projects. A successful sync placement is incredibly meaningful to a songwriter's career, because it not only

provides income, but it can also lead to a growth in streaming or other royalties, and give rise to future songwriting opportunities. For example, we introduced the duo Ayo & Teo to the makers of the popular video game Fortnite, and successfully placed two of their songs in the video game, which led to a spike in the streaming volume of the songs.

23. In addition to cultivating our songwriters' talents and providing them with opportunities to disseminate their music, we also support our songwriters from a financial perspective by providing them with advances against future royalties. Advances allow our songwriters to focus their time and effort on writing songs, rather than needing to relegate songwriting to a part time pursuit while they earn a living working another job. Advances are particularly important to songwriters in the earlier stages of their careers who may not yet have many songs earning revenue. From 2016 to 2020, [REDACTED] of the advances we extended were to new, first-time songwriters with peermusic.¹ For us, advances are not a proxy for how much peermusic values its songwriters. Rather, the quantum of a writer's advance is typically our estimate of what we expect that writer to be able to earn in the initial term of his or her agreement with us.

24. We believe our custom approach to working with our songwriters, rooted in strong, personal relationships, helps our writers have sustainable and satisfying careers. And yet, there is of course no guarantee of success. Investing time, money and resources in the next generation of songwriters is an inherently risky endeavor. If we use peermusic's return on investment as a proxy for a writer's commercial success, approximately [REDACTED] of the writers that we sign are eventually successful, though success is almost never achieved overnight. As a rule, it takes years for our

¹ As a result of peermusic's large heritage catalogue, many of our clients include heirs, estates, and assignees of deceased songwriters. When needed, we provide hardship advances against future earnings to such clients as well.

investments in talent to yield such returns. As an independent music publisher, we are not driven by equity-directed quarterly targets for our writers to reach certain performance metrics.

25. This is why peermusic is both persistent in its development of songwriters, and yet flexible enough to adapt to and embrace change in its approach to working with each songwriter, as music publishing, and the music industry more generally, evolves. In fact, as the music industry evolves, we find ourselves providing services to our songwriters that were traditionally furnished by record companies in the areas of artist development, record production and publicity, in addition to our songwriter development costs. For example, over the last three years, we have worked with rising talent Jona Camacho to develop him from a relatively unknown artist-songwriter to a critically-acclaimed artist with a solid and growing fanbase. During this time, we have invested in the creation of an EP, an LP, five music videos, and live session videos, and we have funded Jona's digital marketing and PR campaigns, as well as multiple writing trips to Los Angeles and Miami.

26. All of these efforts would be for naught if we did not ensure that our writers were properly paid for the exploitation of their works. Peermusic manages all of the complex and expensive administrative tasks associated with licensing our writers' catalogs, collecting and auditing royalty payments from thousands of sources from around the world, and accounting to and distributing royalties to our writers. Particularly in the digital era of music, such tasks would be difficult, if not impossible, for our songwriters to do on their own. One area of particular complexity is the collecting, distributing and reporting of music royalties. We have invested, and continue to invest, significant resources into IRIS, peermusic's proprietary royalty accounting system, for which investments to date have totaled over approximately [REDACTED]. IRIS's online client portal and corresponding mobile app provide our songwriters with tools to synthesize the

millions of lines of data associated with their royalties, allowing them to spend more time focused on their craft.

27. We also protect, defend and enforce our songwriters' legal interests in their works by registering their copyrights with the U.S. Copyright Office, defending against claims involving our songwriters' works, and partnering with the National Music Publishers' Association ("NMPA") to pursue litigation in response to significant acts of infringements. For example, peermusic has served as a plaintiff in industry-leading actions brought by NMPA against unlicensed digital platforms, including fitness company Peloton, gaming platform Roblox and concert streaming service Wolfgang's Vault, among many others. We devote substantial unremunerated efforts to improving a legal landscape we believe is in many ways unfair to songwriters, including efforts in support of legislation such as the Music Modernization Act and engagement with the U.S. Copyright Office and other governmental agencies in matters of policy. By protecting our songwriters' legal interests, we encourage their continued endeavors as songwriters, which further contributes to the ongoing creation and availability of music in the marketplace.

Peermusic's Costs and Expenses In Performing Its Critical Roles

28. It is undeniable that the services peermusic provides to our songwriters have a substantial impact on the continuous proliferation of music available for the public's consumption and enjoyment. Yet we incur significant costs in rendering these services and investing in the future of songwriting.

29. In 2016, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. In certain instances, the growth of streaming has been the direct cause of our increase in costs. The complexity of streaming royalty calculations and their resulting micro penny payments have resulted in an exponential increase in royalty statement line items and resulting processing activity (and therefore costs), particularly over the last five years. [REDACTED]

[REDACTED]

[REDACTED] While much of our processing is automated, some of it is not and cannot become automated,

² See COEX-3.1.

³ Global royalty statements include monies we collect worldwide for our U.S. repertoire.

⁴ See COEX-3.2.

and we will always need employees to review statements manually, including for purposes of reconciliation, to check for and correct errors and discrepancies, and to process adjustments from licensees and societies and CMOs. Over the last 5 years, we have needed to increase the number of employees in our Royalty Department [REDACTED] in order to adequately address this uptick in administrative work.

31. Advances are the most sizeable area of costs. From 2016 through 2020, peermusic has spent approximately [REDACTED] of its yearly revenue on payment of advances to new and existing songwriters each year. Looking only at the past two-and-a-half years, that percentage is [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 5 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

⁵ See COEX-3.3

Peer's Agreements With Digital Services

32. Peermusic has made direct deals with Section 115-Eligible Services.⁶ These deals were [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. I believe the agreements we made with Eligible Services demonstrate two things. First, the statutory rate acts as a ceiling for rates negotiated in the shadow of the compulsory license, as parties generally do not pay more than they have to, and if we refuse to make a deal with an Eligible Service unless it agrees to pay greater than the statutory rate, the Eligible Service can obtain the compulsory license. Second, the statutory rate determined by the Board in the *Phonorecords III* proceeding is clearly not too high, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶ See COEX-3.4 [REDACTED]
 COEX-3.5 [REDACTED] COEX-
 3.6 [REDACTED]
 COEX-3.7 [REDACTED]
 [REDACTED] COEX-3.8 [REDACTED]
 [REDACTED]; COEX-3.9 [REDACTED]
 [REDACTED] COEX-3.10 [REDACTED]
 [REDACTED].

34. For example, we executed an agreement with [REDACTED], after the Board's Initial Determination in *Phonorecords III*.⁷ In that agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸

Similarly, we reached an agreement with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹

35. Our expired agreement with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰

⁷ See COEX-3.7.

⁸ In each case, [REDACTED]

⁹ See COEX-3.5.

¹⁰ See COEX-3.4.

36. We were never able to reach an agreement with

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The bottom line is that the less discretion a Service has to determine what portion of revenue from a bundle is to be allocated to Service Provider Revenue from which copyright owners are to be paid the better. The *Phonorecords III* definition requires more transparency and should [REDACTED] deter gaming, as publishers are well aware of the music services that exist in the marketplace and their standalone prices.

37. We have also made deals with digital services and other licensees that require rights that are not subject to the compulsory license and, where the service also requires a license from a sound recording rights owner, we frequently obtain a “most favored nations” (“MFN”) or similar provision that ensures that we are paid at the same royalty rate or on the same basis as the record label licensors. These types of agreements, to me, indicate that musical works and sound recordings have the same value to these licensees—as they should, as they are both necessary inputs. While we have historically obtained such provisions in our agreements granting rights to synchronize our compositions with visual images, we also obtain such provisions in other contexts.

For example, one deal of note we made recently is with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹¹ We anticipate making more of these types of deals in the future.

38. In situations where there the digital service does not need to obtain sound recording licenses, we usually receive far greater than the statutory rate. For example, in our blanket license with [REDACTED]

[REDACTED].¹² Our lyrics deal

with [REDACTED].¹³ In our deal with [REDACTED]

[REDACTED]

[REDACTED]¹⁴

¹¹ See COEX-3.11 [REDACTED].

¹² See COEX-3.12 [REDACTED]. Note that we are often able to obtain from digital services in our voluntary agreements [REDACTED]

[REDACTED]. I believe that this demonstrates that digital services view our diverse, unique, and exceptional catalog, as well as the catalogs of other independent publishers, as just as vital to the success of their services as the catalogs of major publishers.

¹³ See COEX-3.13 [REDACTED]

¹⁴ For the different types of videos on [REDACTED]

Conclusion

39. Independent music publishers, such as peermusic, play a vital role in the creation of musical works. We discover, nurture (in bespoke ways, and through a songwriter-friendly writer-to-staff ratio), and provide financial and creative support to songwriters. We promote and make their songs available, including through licensing, to a wide audience, protect the copyrights in their songs, and perform the difficult administrative tasks of collecting royalties from dispersed sources and accounting to songwriters. The services we provide to songwriters require significant costs, which continue to rise, and carry significant risk. While the advances we provide to songwriters remain vitally important to them, as they help ensure that they can continue to create great new music, our rate of recoupment has been slowing.

40. The music that peermusic helps create enriches the product offered by Eligible Services. We and other independent publishers take chances on unique (often international) music

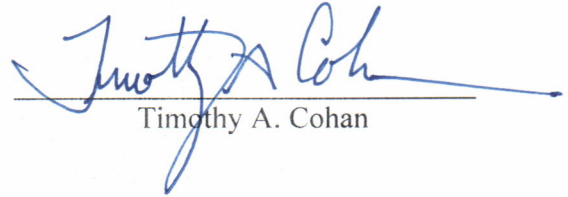


that diversifies the Services' offerings. The value of that music (including its value relative to the value of sound recordings) is reflected in market-based transactions made outside of the shadow of the Section 115 compulsory license.

41. I urge the Judges to adopt the Copyright Owners' proposed rates and terms, which are supported by the facts discussed above.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 13, 2021



Timothy A. Cohan

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21-CRB-0001-PR (2023-2027).

WITNESS STATEMENT OF THOMAS KELLY

1. My name is Thomas Kelly and I am Global Chief Financial Officer of Sony Music Publishing (formerly known as Sony/ATV Music Publishing LLC) (“SMP”).

2. I provided a written witness statement in the previous Copyright Royalty Board proceeding, commonly referred to as *Phonorecords III*.¹ As I said then, everything in music starts with the songwriters. There would be no recordings without songs and there would be no streaming businesses without the songs created by songwriters. And music publishers provide the necessary financial and creative support at ground level: creating catalogues of diverse music, some of which has continued to generate income over decades; providing the revenue necessary to support existing songwriters; and, providing the financial wherewithal to support the music publishers’ search for the songwriters of tomorrow and enabling them to provide the financing necessary to support and sustain neophyte songwriters so that they can focus on creating new works.

3. [REDACTED]

[REDACTED]

¹ A copy of my witness statement from *Phonorecords III* is attached hereto as **COEX-4.1b**

[REDACTED]. But unless there are companies willing to bet significant sums on new songwriters (as well as continue to support established songwriters who have already delivered successful songs), the availability of new songs would inevitably dry up. Music publishers perform this role. In simple terms, it is the income generated by the publishers' existing catalogues of successful songs today that enables us to invest in identifying and supporting the great songwriters of tomorrow.

4. As I will explain in more detail below, because there are separate rights under copyright that are each capable of being individually licensed and hence monetized, music publishers and songwriters have several different income streams. The three primary income streams are from mechanical rights, public performing rights and synchronization rights. Each of these rights and income streams are themselves subdivided. By way of example, public performance income is generated by the performance of musical compositions on terrestrial radio, in bars and restaurants, on non-interactive streaming services and on interactive streaming services. Similarly, mechanical income is generated by the sale of physical recordings and digital downloads, and by interactive streaming. Synchronization income (which, with respect to the blanket licensing of audiovisual platforms, some call reproduction rights) is produced by the individual licensing of specific songs to motion pictures, commercial advertisers, and television programs, as well as to such streaming services as [REDACTED] and others. Because the blanket licensing of our entire catalogue to interactive audiovisual services like [REDACTED] and other services referenced in the witness statement of Peter Brodsky authorizes the audiovisual use of our works, SMP also characterizes the revenue that it receives from such services as "synchronization" income. But the label applied, whether it be synchronization, reproduction or mechanical, does not alter the fact that the income produced is from the blanket licensing of our entire catalogue to

such services, which is no different than the blanket licensing of our catalogue to the interactive audio services in this proceeding.

5. Each of these forms of exploitation and each of these sources of income has importance to us (although the relative importance of each has changed as the delivery of music to consumers has changed). But regardless of their relative importance at any point in time, collectively they provide the revenue necessary to enable music publishers to invest in the songwriters of the future and to pay for the infrastructure costs, both in terms of personnel and technology, necessary to administer our catalogue. Unlike record companies and recording artists, music publishers and songwriters (unless they are also recording artists) do not make money from concert tours (other than receiving performance income from the performance of songs at the concert venues). Nor, unlike record labels and artists, do we or songwriters have the opportunity to make money from merchandising or endorsements or sponsorships. In short, songwriters and publishers generate income solely from the success of the songs written by the songwriters.

6. As I also explained in my witness statement in *Phonorecords III*, music publishers do not merely serve as a financing source for aspiring and successful songwriters. We also market, promote and arrange for the world-wide publication and sub-publication and licensing of the songs in our catalogues, new and old. Music publishers also track the exploitation of the songs in our catalogues, collect, process and distribute the income received from tens of thousands of users worldwide and issue royalty statements to the songwriters. We pursue audits and audit claims against users of music and protect the copyrights in the songs in our catalogues against unauthorized use, both through our in-house counsel and outside litigation counsel.

7. Individual songwriters could not afford to bear the costs of hiring people and building the infrastructure necessary to perform all of these functions, nor could they effectively

license and exploit their songs on a worldwide basis. In short, music publishers perform vital services, not merely for the benefit of themselves and songwriters but, quite frankly, also for the benefit of licensees, whose licensing needs are simplified by music publishers who provide access to catalogues that can total millions of songs written by tens of thousands of songwriters, which can and does substantially reduce the transaction costs of licensees. And the public too is benefitted by the services of music publishers in making available the incredible copyrighted songs written by songwriters over the last more than 90 years and assuring, through their efforts, the continuing creation of new songs in the future. Music publishers are a key pillar of the music industry, and their continued financial success is critical to the stability of the industry, the success of the interactive streaming business, and to the assurance that the public will continue to be delighted, moved and entertained by music created by brilliant songwriters who have yet to be discovered.

8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Over the past few years, we have also seen great growth in the blanket licensing of our catalogue to new (and existing) forms of interactive audiovisual streaming which have provided us with significant increases in what we label as synchronization income (and which other publishers may label as reproduction income) and performance income. These new sources of income include fitness platforms like [REDACTED] and others and other audiovisual streaming services, some of which are interactive, such as [REDACTED]. In addition, other non-blanket licensed audiovisual services such as [REDACTED]

[REDACTED] and others have grown into new sources of synchronization and performance income.

9. We pay attention to the information provided in our financials because they present an ongoing picture of what is happening with the sources of our revenues and enable us to assess whether one form of exploitation may be impacting another form of exploitation, either positively or negatively. As discussed below, one example of this is the impact that interactive audio streaming has had on the sale of physical records and digital downloads and hence the mechanical income SMP and its songwriters receive from such sales.

10. [REDACTED]

[REDACTED], accentuating the importance of assuring that songwriters and music publishers are fairly and fully paid for the use of their music on interactive audio streaming services.

11. [REDACTED]

[REDACTED]²

² I have selected 2009 because it preceded both the *Phonorecords II* proceeding and the growth of interactive audio streaming (there were some players like Rhapsody in the market before Spotify entered the United States market in 2011 but it was not a significant market). In addition, the iTunes Store was well-established by 2009.

12. As a result, in terms of our mechanical income, the data I will discuss below confirms that the increasing dominance of the consumption of music through audio-only interactive streaming has not promoted the consumption of music elsewhere and has not produced much in the way of income for the vast majority of our songwriters. Instead, the growth of interactive audio streaming and interactive audiovisual streaming has substituted for many of the other forms of exploitation that previously provided us and our songwriters with a higher level of mechanical income. Consequently, protecting and enhancing the income SMP and our songwriters receive from interactive streaming, both audio and audiovisual, is important. In the case of audiovisual streaming, because we negotiate our deals in a free and open market, we have the ability to try to protect and enhance our income through such negotiations. However, with respect to interactive audio streaming, that protection is particularly important because our rates and terms are determined in these proceedings and not through an open market negotiation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. As I will explain below, it is the continuing displacement of other sources of income by interactive audio streaming that makes the rates at which we are paid so important to our ability to continue to provide the services necessary to support both the new and established songwriters who will create the music of the future. Similarly, because one prong of our royalty calculations is based on a percent of the interactive streaming service's revenue, making sure that our royalties are protected against business strategies that result in revenue diminution or displacement is also critical.

14. In order for there to be a full picture of the services we provide, along with an analysis of our costs, our revenue and their sources, I am submitting this statement to document, from a financial perspective, the investment that SMP makes in identifying, signing and then supporting the creative efforts of songwriters. I will also identify and explain the financial investment that SMP makes in administering the songs in its catalogue, including the marketing, promoting and licensing of the songs, not merely in the United States but also on a world-wide basis through sub-publishers. Further, I will explain and document the financial investment SMP makes in tracking the exploitation of the songs, collecting and processing the income paid by thousands of licensees, and assuring that the songwriters are then accounted to and paid their share of the income generated by their songs.

15. And finally, I will provide detailed financial analyses of our sources of revenue in both the calendar years 2016 through 2020 and the fiscal years 2017 through 2021 (the periods after I submitted my statement in *Phonorecords III*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³ As I will also explain below, I believe that calendar year 2020 (most of which is part of our 2021 fiscal year) is anomalous in many ways due to the pandemic and the closure of bars, restaurants and other public venues, including concert tours, where music is performed. The anomalies extend not only to some of our sources of revenue but also apply to a number of our categories of costs. I will explain below why I will refer to both calendar and fiscal year information.

I. Professional Background

16. I began my career in music publishing at EMI Music Publishing (“EMI”) in November 1991, after having worked in public accounting at Ernst and Young. While at EMI, I held a number of positions, including Senior Vice President of Finance for North America and Executive Vice President of Worldwide Financial Operations. In January 2008, I was appointed Chief Financial Officer and became responsible for EMI’s accounting and financial operations worldwide. I held that position until EMI was sold to a consortium of investors, including Sony Corporation of America, on June 29, 2012. I then became Executive Vice President, Finance and Administration at Sony/ATV and subsequently, in 2019, became Global Chief Financial Officer of Sony/ATV, which was re-named SMP. I am a Certified Public Accountant and have a degree in accounting from Rutgers University.

17. As Global Chief Financial Officer of SMP, I am responsible for all financial affairs, on a worldwide basis, of SMP. As a part of my responsibilities, Corporate Strategy, IT and the Global Copyright and Royalty Administration functions ultimately report to me. I report directly to the CEO of SMP, Jon Platt.

18. In this witness statement, I will be referring to financial information and attaching documents that are derived from the books and records of SMP (including EMI prior to Sony’s acquisition of 100% of the company in November 2018). In my capacity as Global Chief Financial Officer, I have access to and knowledge of the financial and royalty records of both SMP and EMI and it is my understanding that the financial information to which I will refer has been provided to the other parties in this proceeding. My knowledge of our business operations and our royalty

streams affords me the opportunity to contextualize some of our financial information and explain, from a financial point of view, how the growth of interactive audio streaming has impacted other areas of our business and how revenue from our licensing of the streaming of our works to audiovisual services to whom, just like the services in this proceeding, we license our catalog on a blanket basis, has contributed to the overall growth in our business. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. SMP

19. [REDACTED]

[REDACTED]. It controls many of the most successful and valuable music catalogues of all time. SMP's catalogue includes songs written by iconic songwriters such as John Lennon and Paul McCartney of The Beatles, Michael Jackson, Queen, Leonard Cohen, Smokey Robinson, Holland-Dozier-Holland, Stevie Wonder, Carole King and Gerry Goffin and Duke Ellington. SMP also owns and/or administers classic motion picture songs written by, among others, Harry Warren and by Yip Harburg and Harold Arlen (including "Over The Rainbow"). SMP's songwriters also include contemporary songwriters like Ed Sheeran, Pharrell Williams, Lady Gaga, Daddy Yankee, Beyonce, Sara Bareilles and Travis Scott. While many of these songwriters who are also recording artists are now household names, it was not always

so and music publishers like SMP supported many of these contemporary superstar songwriters before they achieved success.

20. As reflected on **COEX-4.2** hereto, [REDACTED]

[REDACTED]

[REDACTED] It is a reality of the music business, as has been widely reported and commented on, that the creation of new songs has become far more collaborative than in the past, with song splits being divided among multiple songwriters with each having a smaller fractional share. This is especially true with hip hop music, where producers in the studios and producers of “beats” used in the songs often obtain songwriter credits, but even popular music now frequently has multiple credited songwriters. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, some of the growth in our overall income (both from interactive streaming as well as performance income and other income streams) is obviously attributable to the growth in the number of songs in our catalogue and the increase in the number of songs generating interactive audio streaming income. As I will also explain below, the growth in our catalogue of songs generally, and specifically those that are being exploited by the interactive audio streaming services, has not come without a significant cost to SMP, both in terms of the advances we have paid to songwriters and our overhead and operational costs.

III. The Role of Music Publishers In The Creation and Exploitation of Music

21. As explained in more detail in the accompanying witness statement of SMP’s Executive Vice President, Business and Legal Affairs, Peter Brodsky, music publishers like SMP employ hundreds of people who are responsible for all of the activities that ultimately assure the

continuing availability to the public of not only existing songs but that also support the creation of new songs by both established and new songwriters.

22. As Mr. Brodsky explains in his witness statement, the critical functions performed by music publishers start with the Creative Department, which is dedicated to searching for new and unknown songwriters and then working with them to hone their talents and to, *inter alia*, identify recording artists interested in recording their songs. The business affairs and legal departments perform a broad array of critical services, including negotiating and drafting contracts with new songwriters, extending agreements with existing songwriters, acquiring catalogues of songs, securing extended renewal term agreements under the Copyright Act with songwriters and their heirs, negotiating agreements with prospective licensees for the exploitation of songs (including with interactive audio and audiovisual streaming services and the new home exercise platforms), and protecting and enforcing the rights in the songs along with outside litigation counsel.

23. Music publishers also have finance and business development departments which focus on, among other things, the acquisition of rights from new songwriters, existing songwriters, and the heirs of deceased songwriters and acquiring catalogues, and the payment of advances to existing songwriters and new and unproven songwriters. Where there is an existing track record for catalogues, past history provides somewhat of a guide to anticipated future income. However, in a time, such as now, where traditional sources of income are diminishing and new sources of income are growing, there is heightened uncertainty and risk, requiring experience and judgment (and even then, past history has become a far less certain predictor of future income).

24. However complicated the financial assessment may be with respect to existing songwriters, existing catalogues and extended renewal term rights, those problems are far greater

when it comes to trying to determine appropriate advances to be made to songwriters who have little, if any, track record at all. One simply does not know if an unproven songwriter will ever actually write successful songs, who they may collaborate with in writing the songs, and what share of the songs may be attributed to them (which is one determining factor of the income that will be earned). Ultimately, entering into agreements with unproven songwriters requires that SMP and other publishers assume the risk that the advances they pay will never be recouped. Yet, unless there were music publishers willing to back up their belief in the talent of unknown songwriters with advance payments against royalties that may never be earned, not only would the public likely be deprived of the next Ed Sheeran or John Lennon & Paul McCartney or Carole King or Lady Gaga or Michael Jackson or Travis Scott, but the output of new music would inevitably be reduced.

25. Music publishers take these financial risks, many of which never pay off, because they can fund these risky advances, which are investments in the future of music, through the income being generated by their existing catalogues of songs. That is one of the often-unappreciated benefits provided to the public and to licensees of the aggregation of catalogues by music publishers. Because music publishers have been able to take these risks, the public and the streaming services enjoy the benefits of the new original music that the new songwriters create, without having to bear the costs associated with the failed investments made in the new songwriters who prove unsuccessful.

26. Another important service performed by music publishers is the worldwide licensing of their catalogues. Music publishers have large departments dedicated to licensing. In order for both songwriters and publishers to generate income from songs, the songs must be licensed for exploitation. Songs generate income from a variety of uses. Currently, in the United States, most mechanical licensing is performed through the MLC, which was established under

the Music Modernization Act, although direct licenses are still being negotiated by publishers, especially where additional rights beyond the mechanical reproduction right are being sought by a licensee.

27. Music publishers have employees devoted to securing synchronization licenses for the use of songs in commercial advertisements and in television programs and motion pictures. They license songs on an individual basis for use in film and programs, including to such streaming services as [REDACTED]. Further, the increasing importance of various audiovisual interactive streaming platforms such as [REDACTED] – which, as I mentioned, are licensed not for specific songs but on a blanket basis, just like the services in this proceeding – involves our digital licensing team (the same team that has been involved in direct licensing with the services in this proceeding). And beyond this licensing activity, the licensing of live theater productions, known as “grand rights,” has become increasingly important. Over the years, SMP has licensed such live theatrical productions as “Mamma Mia,” “Jersey Boys,” “Beautiful, The Carol King Musical,” “Motown The Musical” (and other productions mentioned in the witness statement of Peter Brodsky), as well as licensing the interpolation of some of our works in “Hamilton.”

28. As Mr. Brodsky’s witness statement also reflects, music publishers have departments devoted to the administration of the copyrights, including making sure that the copyrights are protected and registered with the United States Copyright Office, as well as with mechanical and performing rights collecting societies around the world. In addition, they ensure that the copyrights are licensed to both affiliated and unaffiliated foreign sub-publishers for exploitation abroad.

29. The copyright administration department also performs critical research roles with respect to historical catalogues. Copyrights currently endure for the life of the author plus 70 years. For older works that were copyrighted under the 1909 Copyright Act, the term of United States copyright protection is now 95 years. EMI, in particular, has a very significant historical catalogue, owning and administering songs that were written as early as the 1920s. The copyright administration department is responsible for maintaining and frequently researching the records relating to these songs in order to ensure that they are protected and that they continue to generate income.

30. [REDACTED]

31. Music publishers like SMP have had to make significant investments in music rights management and royalty accounting systems and to continually upgrade them to assure that they are user (royaltor) friendly. For example, SMP's system includes a portal so that royaltors (whether songwriters, co-publishers or heirs of songwriters) can access their statements online as well as receiving them in hard copy. The exploitation of songs is a world-wide business and publishers like SMP receive royalty statements and payments from tens of thousands of licensees, most of which are received electronically and by wire currently but some of which continue to be in paper form.⁴ All of this data has to be processed and royalty statements (and royalty information made available through the SMP royaltor portal) have to be generated, either quarterly or semi-annually (depending upon the terms of the specific songwriter agreement), to each of the tens of

⁴ [REDACTED]

thousands of songwriters, heirs of songwriters, and co-publishers of the songs owned and administered by SMP.

32. As I explained in my *Phonorecords III* witness statement, SMP's Copyright and Royalty Administration Department employs a proprietary system known as TEMPO that manages its copyright and royalty information. [REDACTED]

[REDACTED]

[REDACTED] In addition, as I will explain below, SMP employs a large team in Nashville who are engaged in reviewing and processing the royalty statements we receive from licensees and users of music from around the world and preparing the royalty statements necessary to fully account to our songwriters, co-publishers and the heirs of songwriters.

IV. SMP's Departments Provide Necessary Services To Songwriters

A. SMP's Creative Department

33. As I have already stated, in terms of the continuity of the creation of new musical works, music publishers like SMP are intensely focused, not merely on trying to sign or extend agreements with already successful songwriters, but on identifying and signing the songwriters of the future, some of whom, hopefully, will write the songs people will be singing for years.

34. The consuming public is constantly looking for new music to listen to, songs that will help frame the events of their lives. Music publishers like SMP employ people whose sole role is to look for talented new songwriters and, assuming we are able to sign them, to work with those songwriters and, where those songwriters are not also performers themselves, to introduce them and/or their songs to recording artists whose style and genre match the songs of our songwriters, and to their potential licensees. Indeed, even those songwriters who are recording artists themselves are often sought out by other artists who hope to obtain a song or songs written by our songwriters and,

in turn, our songwriters sometimes write a song or songs for a particular other artist. In each instance, music publishers help make these connections.

35. Again, as Mr. Brodsky's witness statement explains, SMP's Creative Department employees are charged with, *inter alia*, discovering and developing new songwriting talent, identifying established songwriters we can work with going forward, and retaining our existing roster of songwriters when the term of their contracts with us expire. [REDACTED]

[REDACTED]

[REDACTED]

B. SMP's Creative And Business Development Departments Determine The Advances To Acquire Rights And Support Songwriters

36. [REDACTED]

[REDACTED]

[REDACTED]

SMP's Business Development Department is responsible for trying to determine the quantum of advances. Having due regard for the Creative Department's assessment of the prospects of the songwriter to be signed, with a new songwriter with no track record, this involves the assumption of a significant financial risk and even with existing songwriters with a track record, there is a financial risk. Where SMP believes that it is competing against another publisher, that too must be considered.

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

38. The risk that music publishers like SMP are now assuming to find the songwriters of the future, the income from whom will, in turn, support the continued search for succeeding generations of new great songwriters, is increasing. Attached as **COEX-4.3** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

39. [REDACTED]

[REDACTED]

Today, we are competing not only with other music publishers but with financial investors (including publicly traded funds) who have driven up the purchase price of existing catalogues. The multiples that are being paid by these investors are well beyond historical multiples (and some publishers as well as songwriters with significant bodies of work have taken advantage of the

willingness to pay by these investors, as has been well-reported in the press).⁵ The activity of these investors has also increased the cost of advances. These advances are paid not only so that we can retain the rights to existing songs and acquire rights to songs yet to be written (and thereby to continue to compete with other music publishers) but to enable both established and unproven songwriters to continue to work.

40. The advances paid by SMP constitute increasingly risky but necessary investments in the songwriter's talent. Based on our experience, while we always hope that these advances will eventually be recouped from the income that may be produced if the songwriters are successful, in fact, many of the advances we make are never recouped and must be written off. Even where we pay advances to successful songwriters to administer their existing songs, with the changes in the music industry's landscape, there is no assurance that the advances we pay will be recouped in any reasonable period of time. For new songwriters, the risks are obviously compounded. There is no guarantee that their songs will ever be recorded, or, if recorded, that the recordings will be successful.

41. Attached as **COEX-4.4** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ This is something of a new phenomenon and it remains to be seen whether the multiples that are being paid by some of these investors, which I believe have been largely driven by historically low interest rates, making the cost of money nominal, prove to be capable of providing a return to the investors as opposed to a fee to the sponsors. But while some of these funds and financial investors actually have created full-service publishers (like Round Hill and Reservoir Media), many do not serve the function of signing new and unproven songwriters and they also do not bear the overhead costs of full-service music publishers, instead commonly having their catalogues administered for a fee by a full-service music publisher. In short, they really do not contribute to the creation of new music by the songwriters of the future.

[REDACTED]

[REDACTED]

[REDACTED] As shown on **COEX-4.3**, [REDACTED]

[REDACTED]

[REDACTED]

42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

43. To place these advances in context, as reflected on **COEX-4.5** (which I will address in detail below), [REDACTED], as shown on

COEX-4.3, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶

C. SMP's Business And Legal Affairs Department

44. The discovery and development of songwriting talent also involves the Business and Legal Affairs Department. [REDACTED]

[REDACTED]

[REDACTED]. The Business and Legal Affairs department consists primarily of lawyers and other professionals with deep experience in the music industry. Not only do they negotiate and draft songwriter agreements with both new and established songwriters, but they also supervise outside counsel in litigations involving the protection of the songs in SMP's catalogue, defending against claims of infringement that are leveled against our songwriters (and against SMP) and in the negotiation and drafting of the more complicated license agreements.

45. The Business and Legal Affairs Department is also heavily involved in negotiating and drafting agreements by which SMP acquires catalogues of songs from successful songwriters (or their heirs) and from other publishers. It is also a critical player in evaluating termination rights, both those asserted with respect to songs in our existing catalogue and songs that currently belong to other publishers, and in negotiating and concluding agreements with songwriters and/or their heirs with respect to the purchase of extended renewal term rights, which are rights arising under two complex and little-understood provisions of the Copyright Act which enable songwriters and their heirs to recapture rights they have granted and to then resell them.

⁶ [REDACTED]. As I said above, advances paid to existing successful songwriters are critical because retaining rights to successful songwriters and their catalogues provides the anticipated income necessary to enable SMP to be able to continue to make advances to new songwriters who have yet to earn any income.

46. As I have explained, it is the revenue generated by existing successful catalogues of songs that enables SMP and other publishers to continue to look for and sign the songwriters of tomorrow's hits, whose songs' income will, in turn, support the continued search for and signing of the next succeeding generation of songwriters. The collaborative work of our Business and Legal Affairs Department, with our Creative Department and our Copyright and Royalty Administration Department, all subject of course to the ultimate decisions of management (including Jon Platt), is critically important in maintaining and growing the revenue base of SMP that supports the continued output of great music.

D. SMP's Licensing Departments

47. SMP maintains significant licensing departments of experienced people in licensing synchronization rights, mechanical rights, digital rights and stage rights. SMP's Synch Licensing Department negotiates and issues synchronization licenses that authorize the use of SMP's songs, on an individual basis, in motion pictures, television programs, commercial advertisements, video games or any other audiovisual medium (but not interactive audiovisual streaming, which is handled by our digital licensing department in combination with our Business and Legal Affairs Department). [REDACTED]

48. The cost of maintaining this department is a part of the investment SMP makes to maximize the exposure of the works of our songwriters and to help generate income from their songs. Again, I do not believe that individual songwriters could effectively represent their songs to all of the various potential licensees of synchronization rights as the costs of doing so would, except perhaps for the most successful songwriters, be prohibitive. But the use of songs in motion pictures, television programs and commercial advertisements not only produce a synchronization fee and in

streaming and broadcast uses, performance income, but can also be incredibly promotional (by way of example, our licensing of Queen songs for use in the motion picture “Bohemian Rhapsody” unquestionably resulted in a meaningful increase in the income from Queen songs from other uses, including from interactive audio streaming).

49. As I said above, currently most mechanical licensing for interactive audio streaming in the United States is done through the Mechanical Licensing Collective, which was established under the Music Modernization Act to serve as the licensing agent/clearing house for mechanical licensing (although publishers still issue direct licenses). In addition to our Business and Legal Affairs and our Mechanical Licensing Department working on direct mechanical licenses, in certain instances they will also issue direct performing rights licenses. However, like most publishers, SMP licenses most public performance rights in the United States through the performance rights organizations (ASCAP, BMI, SESAC or GMR). As I stated in my statement in *Phonorecords III*, one of the expenses we previously incurred on behalf of our songwriters involved the expenditure of millions of dollars in “rate court” proceedings involving BMI and ASCAP and in a United States Department of Justice inquiry into what are known as the ASCAP and BMI “Consent Decrees.” These are expenses incurred by publishers on behalf of their songwriters.

50. In addition, of course, as members of the NMPA, SMP, along with other NMPA members, helped finance the joint effort of songwriters and publishers to obtain fair royalties in *Phonorecords III* (and are financially supporting the effort in this proceeding). All these expenses are part of our effort to protect and enhance the value of the catalogues of music SMP controls and to protect the income to be generated for our songwriters now and in the future.

E. SMP's Copyright And Royalty Administration Department

51. As I briefly mentioned above, one of the critical services provided by music publishers is the processing of royalties that are received from users of songs and the generation of statements and payments to songwriters (and under our TEMPO system, the maintenance of our royalty portal to afford royaltors with ready access to their royalty information). These royalty services are also administered by SMP's Copyright and Royalty Administration Department.

52. While royalty processing has become highly automated and electronic, it is by no means entirely electronic or automated. There are always statements or parts of statements that are not accurately reported and cannot be matched. These all must be examined by our employees and then, to the extent they remain unmatched, they are processed through the use of matching algorithms. As I mentioned, there also continue to be statements and payments that come in paper form and have to be coded and matched manually by our employees in the Copyright and Royalty Administration Department.

53. Further, the employees of the Copyright and Royalty Administration Department handle calls from royaltors, including our songwriters and their heirs (as well as their lawyers) and try to address their questions. There are also audits regularly conducted on behalf of songwriters and the employees of the Copyright and Royalty Administration Department address the audit inquiries and provide responses to audit reports and participate in the resolution of any audit disputes.

54. And, of course, like any other business, SMP has its Global Management Department, consisting of its senior-most executives who are responsible for establishing policy, supervising and managing all of the separate departments and the activities of SMP's foreign affiliates, and making the ultimate decisions on how SMP deploys its resources. There is, obviously, a cost associated with our senior-most executives' compensation.

V. The Costs Of All Of The Services Provided By SMP To Songwriters

55. The costs associated with all of the departments and activities I have discussed above – Creative, Business and Legal Affairs, Finance, Copyright and Royalty Administration, Synch Licensing, Digital and Mechanical Licensing and Global Management – are accounted for in our operating expenses, of which the largest line item is employee costs. Attached hereto as **COEX-4.6** [REDACTED]

[REDACTED] And these expenses do not include the amount of advances we pay to songwriters and the catalogue acquisition costs. As I said above, the increase in the number of songs in our catalogue as well as those we have provided to the interactive audio streaming services and which are generating income [REDACTED] has a cost associated with it that we have borne. [REDACTED]

⁷ As **COEX-4.6** reflects, there were several anomalies in fiscal 2021 that caused one-time reductions in our costs. [REDACTED]

[REDACTED] I expect that there will be a similar downward impact on such costs in fiscal 2022, at least for the first half of the fiscal year.

**VI. The Changes In The Mix Of Music Revenues
And The Rise Of Interactive Audio Streaming Services**

56. As I mentioned above, **COEX-4.5** is a schedule of SMP's revenues for fiscal years 2017 through 2021 (and provides, for comparative purposes, the combined SMP and the separate Sony/ATV and EMI revenues for 2014 through 2016).⁸ The trends that I mentioned in my witness statement in *Phonorecords III* regarding the declines in the sale of physical recordings and digital downloads (as interactive audio streaming income began to increase), have accelerated in the period from fiscal 2017 through fiscal 2021. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹ [REDACTED]

[REDACTED]

[REDACTED]

⁸ Because SMP is on a fiscal year that ends March 31 of each year, fiscal year 2021 covers April 1, 2020 through March 31, 2021. Our financials are also on an accrual basis, rather than a cash basis. In my analysis below of our mechanical and streaming income, I will also present some of the data on a calendar and cash basis (to coincide with our receipt of actual revenue and our payments of royalties to songwriters) so the revenue information will not precisely match up with our P&L because the periods do not fully coincide and because our P&L is prepared on an accrual basis. Where I am using fiscal year or calendar year data, I will note it, as I will where I use both fiscal year data and calendar year data. While the numbers will not precisely match, I believe that my analyses and comparisons will still fairly reflect SMP's financial results and that of our songwriters.

⁹ [REDACTED] The reason for this slight differential is that the financial figures presented in my prior witness statement only included SMP's U.S. reporting entity and did not include other reporting entities within our business that also represent publishing income generated in the U.S. In order to make the year to year comparisons correct, I have now included this income earned in the U.S. in this statement.

[REDACTED]

57. [REDACTED]

[REDACTED]

[REDACTED] Based on the trends, I expect that mechanical income from physical recordings and digital downloads will continue to diminish but I do not expect that they will disappear entirely (as there will continue to be collectors and other people who want to own physical recordings, especially vinyl product).

58. As is also shown by COEX-4.5, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, by fiscal year 2021, interactive audio streaming accounted for [REDACTED] of SMP's mechanical income (combining EMI and Sony/ATV). That percentage increase is due in part to the growth of interactive audio streaming but also in part to the sharp drop in mechanical income from physical recordings and digital downloads.¹⁰

59. The growth of interactive streaming royalties does not mean that these royalties have kept pace with the dramatic growth in the streaming business. [REDACTED]

[REDACTED]

[REDACTED]

¹⁰ As I will show below, even with this growth, which reflects accruals and not actual cash collected, [REDACTED], on a cash basis (meaning that the actual diminution in mechanical income is even greater).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

60. The foregoing is dramatically shown by comparing the mechanical income received by SMP and its songwriters in calendar year 2009 (before Spotify and the other services in this proceeding started their interactive audio streaming businesses in this country but years after the iTunes Store created the digital download market) with the mechanical income received in calendar years 2016 through 2020 from interactive audio streaming as well as the total mechanical income, including streaming and from the sale of physical records and digital downloads in 2016 through 2020. Attached hereto as **COEX-4.7** and **COEX-4.8** are schedules from our royalty accounting data providing that comparison. **COEX-4.7** is a schedule showing total mechanical income in 2009 and mechanical income, including from interactive audio streaming, from 2016 through 2020. **COEX-4.8** is a schedule showing streaming mechanical income from calendar year 2016 through 2020.

61. As shown on **COEX-4.8**, in calendar year 2016, [REDACTED] received mechanical income from the interactive audio streaming of their songs and there were a total of [REDACTED] that earned mechanical income from interactive audio streaming.¹¹ The gross mechanical income from interactive audio streaming was [REDACTED] [REDACTED] resulting in the songwriter's share of mechanical

¹¹ When one compares the number of songwriters in **COEX-4.7** with the number of songwriters in **COEX-4.8**, the difference is because there is not complete overlap between those songwriters receiving mechanical income from interactive audio streaming and those receiving mechanical income from the sale of physical records and digital downloads in addition to interactive audio streaming. Thus, the number of songwriters receiving mechanical income is greater than only those songwriters receiving mechanical income from interactive audio streaming.

income from interactive audio streaming being [REDACTED]. The songwriters therefore received on [REDACTED] in mechanical income from interactive audio streaming in calendar year 2016.¹²

62. In contrast, if one examines the data for 2009 on **COEX-4.7**, the gross mechanical income that year was [REDACTED], resulting in the songwriters' share of mechanical income being [REDACTED]. The number of songwriters receiving mechanical income in 2009 was [REDACTED] and the total number of songs receiving mechanical income was [REDACTED]. On average, the songwriters in 2009 therefore received [REDACTED] in mechanical income, [REDACTED] (and by calendar year 2020, the average mechanical income from interactive audio streaming [REDACTED]).

63. Even if one adds to the songwriters' share of interactive audio streaming mechanical income the songwriters' share of mechanical income from the sale of physical records and digital downloads in 2016, as shown on **COEX-4.7**, the gross mechanical income is [REDACTED], resulting in the songwriters' share of mechanical income being [REDACTED] who received mechanical income [REDACTED]. The songwriters therefore received on average [REDACTED]. In other words, even including all sources of mechanical income and not merely interactive audio streaming mechanical income, our songwriters still received [REDACTED].

¹² If one examines the songwriter share of mechanical income from interactive audio streaming received by SMP in fiscal year 2017 (as shown on **COEX-4.10**, and as analyzed below in Paragraph 73), [REDACTED]. In fact, it is likely slightly less as the number of songwriters receiving interactive audio streaming mechanical income grew from calendar year 2016 to 2017, as shown on **COEX-4.8**.

[REDACTED]

[REDACTED]

64. By 2020, with the growth in interactive audio streaming, as shown on **COEX-4.8**, [REDACTED] received mechanical income from the interactive audio streaming of their songs and [REDACTED] earned mechanical income from interactive audio streaming [REDACTED]. The gross mechanical income from interactive audio streaming in calendar year 2020 was [REDACTED], resulting in the songwriters' share of mechanical income being [REDACTED] of the average mechanical income received by SMP's songwriters from the sale of physical records and digital downloads in 2009.¹³ And again, [REDACTED] despite the fact that SMP's NPS share of that income had been [REDACTED]

65. Again, even if one adds to the mechanical income from interactive audio streaming the mechanical income earned by our songwriters from the sale of physical records and digital

¹³ Again, if one examines the songwriter share of mechanical income from interactive audio streaming received by SMP in fiscal year 2021 as opposed to calendar year 2020 (as shown on **COEX-4.10**), [REDACTED]

downloads in 2020, as shown on **COEX-4.7**, [REDACTED]^{14 15}

[REDACTED] resulting in the songwriters' share of mechanical income being [REDACTED] who received mechanical income [REDACTED]

[REDACTED] The songwriters therefore received on average [REDACTED]

[REDACTED] I would also note that, because interactive audio streaming has substituted for and not promoted the sale of physical records and digital downloads, [REDACTED]

[REDACTED]

66. I would also note that as shown by **COEX-4.8**, in 2016, SMP's NPS, the share of income it received and retained, [REDACTED]
[REDACTED]. The songwriters received some [REDACTED]. By 2020,

¹⁴ Even though mechanical income from interactive audio streaming [REDACTED]

¹⁵ Again, as I mentioned above, [REDACTED]
[REDACTED] while the royalty data on these exhibits is on a calendar year and are presented on a cash basis. The comparisons between 2009 and 2016 through 2020 are therefore like to like.

while the interactive audio streaming mechanical income [REDACTED]

[REDACTED] 16 17

67. I am mindful of the fact that interactive audio streaming also generates performance income and I have also done a year-by-year analysis of the streaming income received by SMP and its songwriters, inclusive of both mechanical income and performance income, the two components of royalties paid by the interactive audio streaming companies. This analysis requires reference across several exhibits, including **COEX-4.7**, **COEX-4.8**, **COEX-4.9**, **COEX-4.10** and **COEX-4.11**.¹⁸

68. **COEX-4.9** reflects all the performance income from interactive audio streaming, interactive audiovisual streaming and non-interactive audiovisual streaming on a fiscal year basis and breaks out the performance income according to the sources. **COEX-4.10** presents both the mechanical income and performance income received from interactive audio streaming services,

¹⁶ As I will show below, and as can be seen on line 25 of **COEX-4.10**, when one also factors in the performance income from interactive audio streaming, including the songwriter share of performance income (which SMP does not process but is paid directly to songwriters by the performing rights organizations), [REDACTED].

¹⁷ SMP's NPS with respect to interactive audio streaming mechanical income (and ultimately also all income) is [REDACTED].

¹⁸ To be clear, **COEX-4.7** and **COEX-4.8** are analyses of mechanical income and interactive audio streaming mechanical income presented on a calendar basis, which is a cash basis. **COEX-4.9**, **COEX-4.10** and **COEX-4.11** are presented on a fiscal year basis, showing performance income on **COEX-4.9**, combined mechanical and performance income, including songwriter share of performance income, on a fiscal year basis on **COEX-4.10** and combined synch and performance income, including songwriter share of performance income, on a fiscal year basis on **COEX-4.11**. So, as I have said, the numbers on **COEX-4.7** and **COEX-4.8**, and on **COEX-4.9**, **COEX-4.10** and **COEX-4.11** do not precisely match up.

including the songwriter share of performance income paid to the songwriters' performing rights organizations, on a fiscal year basis. **COEX-4.11** presents both the synch income and performance income received from audiovisual streaming services, including the songwriter share of performance income paid to the songwriters' performing rights organizations, on a fiscal year basis. Since the songwriter share of performance income essentially equals the publisher share, one can double the performance income as shown on line 12 of **COEX-4.10** and **COEX-4.11** to incorporate the songwriter share of performance income. I am including the songwriter share of performance income in my analysis in order to capture the full amount of the royalty income being paid by the interactive audio streaming services and to compute the true percentage share of the interactive audio streaming dollar that is being paid to writers and the real effective NPS share being received and retained by SMP.

69. As shown on line 14 of **COEX-4.9** and line 11 of **COEX-4.10**, the performance income from interactive audio streaming in fiscal year 2017 (which runs from April 1, 2016 through March 31, 2017) amounted to [REDACTED]. Doubling that amount to account for the songwriters' share of performance income [REDACTED]. As shown on **COEX-4.10**, the mechanical income from interactive audio streaming in fiscal year 2017 [REDACTED] SMP's NPS percentage in calendar year 2016 [REDACTED] as shown on **COEX-4.8**.¹⁹ [REDACTED] SMP's NPS of the interactive audio mechanical streaming income for fiscal 2017 amounts to [REDACTED] and the songwriters' share of the mechanical income was [REDACTED].

¹⁹ As I said above, our fiscal year runs from April 1 of each year through March 31 of the next succeeding year, so calendar year 2016 incorporates the majority of our fiscal year 2017.

70. Because interactive audio streaming income consists of both mechanical income and performance income, I have examined SMP's NPS percentage of the publisher's share of performance income from interactive audio streaming and it is reflected, year by year, on **COEX-4.10**. Our share of the publishers' share of the interactive audio streaming performance income is higher than our share of the interactive audio streaming mechanical income. As shown on **COEX-4.10**, SMP's share of the publishers' share of performance income of [REDACTED] and the songwriters' share of the publisher's share of performance income would be [REDACTED]. But because the songwriters also receive their share of performance income directly, [REDACTED]

71. Thus, as computed on **COEX-4.10**, the total songwriter share of mechanical and performance income from interactive audio streaming in fiscal year 2017 is [REDACTED]. As is also reflected on **COEX-4.10**, SMP's NPS percentage of the total interactive audio streaming income is [REDACTED]. In other words, the songwriters received over [REDACTED] out of every dollar in interactive streaming income in fiscal 2017.

72. When one examines fiscal year 2021 on line 14 of **COEX-4.9** and line 11 of **COEX-4.10**, the performance income from interactive audio streaming in fiscal year 2021 (which runs from April 1, 2020 through March 31, 2021) amounted to [REDACTED]. Doubling that amount to account for the songwriters' share of performance income results in a total performance income from interactive audio streaming of [REDACTED]. As is also shown on **COEX-4.10**, the mechanical income from interactive audio streaming in fiscal year 2021 amounted to [REDACTED]. As shown on **COEX-4.8**, SMP's [REDACTED]. Applying this NPS percentage to the gross mechanical income from interactive audio streaming,

SMP's NPS of the interactive audio mechanical streaming income thus amounts to [REDACTED] and the songwriters' share of the mechanical income was [REDACTED]

73. As I said above, SMP's NPS percentage of the publisher's share of performance income from interactive audio streaming is shown on **COEX-4.10** [REDACTED]. As such, as is also shown on **COEX-4.10**, SMP's share of the publisher's share of performance income of [REDACTED] and the songwriter share of the publisher's share of performance income would thus be [REDACTED]. But because the songwriters also receive their share of performance income directly, [REDACTED] as the songwriters' share of performance income.

74. Thus, as shown on **COEX-4.10**, the total songwriter share of mechanical and performance income from interactive audio streaming in fiscal year 2021 is [REDACTED]. SMP's NPS share of the mechanical and performance income is [REDACTED]. Added together, the total income from interactive audio streaming in fiscal 2021 is [REDACTED]. And SMP's NPS percentage of the total interactive audio streaming income, as shown on **COEX-4.10**, is [REDACTED]. In other words, the songwriters received [REDACTED] out of every dollar in interactive streaming income in fiscal 2021.

75. As reflected on **COEX-4.5**, SMP's performance income from traditional sources (terrestrial radio, television, cable television, restaurants/hotels, concert tours) has fluctuated year by year, dropping from about [REDACTED] (with fluctuations in between those years, sometimes higher and sometimes lower).²⁰ As I will detail below and as shown on **COEX-4.5**, however, the performance income SMP (and its songwriters) have received

²⁰ [REDACTED]

from terrestrial radio, television and cable television [REDACTED] as interactive audio streaming has grown, substituting for and replacing the performance income we previously received from such sources. [REDACTED]

76. As shown on **COEX-4.9**, [REDACTED] in streaming performance income in 2016, some [REDACTED] was attributable to interactive audio streaming performance income, some [REDACTED] was from audiovisual streaming and some [REDACTED] was from non-interactive audio streaming. Of the [REDACTED] in streaming performance income in 2021, some [REDACTED] was attributable to interactive audio streaming performance income, some [REDACTED] was from audiovisual streaming and some [REDACTED] was from non-interactive audio streaming.

77. However, as shown on **COEX-4.5**, while our terrestrial radio performance income in fiscal year 2014 was over [REDACTED], by 2021 it had [REDACTED]. And that “top line” number is inflated by a BMI settlement payment for the period of 2017 through 2019 of some [REDACTED]. Thus, our actual terrestrial radio performance income actually [REDACTED], on a current basis, by some [REDACTED]. And while [REDACTED] (despite the substantial growth of our catalogue), our cable television performance income [REDACTED].²¹

²¹ I am ignoring the drop in performance income from restaurants/hotels as well as from concert tours as they were clearly impacted by the pandemic.

78. In addition, the “top line” numbers also mask some disturbing trends in our terrestrial radio performance income. I looked at the trendline of the last 8 performance quarters, 1Q 2019 (performances taking place January-March 2019) to the most recent earnings quarter, 4Q 2020 (performances taking place October-December 2020) as reported by ASCAP. During this time frame, our ASCAP performance income from all streaming sources [REDACTED] but that [REDACTED] to our performance income from other sources. The data reveals:

- Total ASCAP earnings from terrestrial radio were [REDACTED]
- Total ASCAP satellite radio earnings were similarly [REDACTED]
- The actual payment of terrestrial radio earnings from ASCAP [REDACTED] within this timeframe.²²

79. While there is no question that performance income from all forms of streaming activity has increased – particularly our audiovisual streaming performance income – as the trends in our performance income from other sources reflect, it appears to me that interactive audio streaming is having a negative impact on the performance income we receive from terrestrial radio and cable (where there are channels devoted to music that appear to be diminishing in the performance income they are producing). As with our experience with mechanical income from physical recordings and digital downloads, it is clear to me that interactive audio streaming is not promotional of other streams of income but instead is substitutional. As such, the income we and

²² This data is determined by netting out the bonus payments from top airing songs whose revenue source represents unaligned licensees such as bars, restaurants, hotels and other general establishments. Thus, while [REDACTED], based on general licensing performance income were negatively impacted by the pandemic, for purposes of this analysis, [REDACTED] so that the comparison is based solely on terrestrial radio base income to eliminate the pandemic effect.

our songwriters receive from interactive audio streaming has to take into account the losses we are suffering from the erosion of our other sources of performance income.

80. While SMP's NPS share of interactive audio streaming income has continued to diminish over time, as the foregoing makes clear, the growth of interactive audio streaming, coupled with the corresponding diminution in our and our songwriters' mechanical income from physical recordings and digital downloads and the trendline reflecting that interactive audio streaming is also negatively impacting our performance income from other sources, makes our income and that of our songwriters from interactive audio streaming all the more important. In fact, using the data from all of the foregoing exhibits, one can assess the relative contribution of interactive audio streaming income to SMP's net profits in any year and year to year.

81. Taking our fiscal year 2020 (from April 1, 2019 through March 31, 2020) as a sample year (so that it eliminates the pandemic effect that largely arose starting the very end of March), SMP's revenues from US operations, as reflected on our US profit and loss statement (COEX-4.12) [REDACTED]. In that same year, our revenues from US interactive audio streaming, inclusive of mechanical income and performance income, were [REDACTED] [REDACTED] from line 9 of COEX-4.10 [REDACTED] from line 11 of COEX-4.10), [REDACTED] [REDACTED]. In addition, the songwriters received directly from their PROs their songwriters' share of performance income [REDACTED] [REDACTED] as shown on line 12 of COEX-4.10) for a total payment of [REDACTED]

82. As also shown by these exhibits, our [REDACTED] from interactive audio streaming and our NPS percentage, when one includes the directly paid songwriter share of performance income, [REDACTED] as shown on line 25 of COEX-4.10. As shown on COEX-4.12,

our overall NPS (line16) [REDACTED]. While interactive audio streaming was [REDACTED] of our total revenue, as a percentage of our NPS, it was only [REDACTED] [REDACTED]).

83. As detailed on **COEX-4.3** (and discussed above), in fiscal year 2020, SMP paid [REDACTED] in new advances to songwriters (and our unrecouped balance [REDACTED] [REDACTED]. In addition, our overhead costs in connection with our U.S. operations, as reflected on **COEX-4.6**, in fiscal year 2020 totaled [REDACTED] [REDACTED] as follows:

84. As also reflected on lines 20 through 35 of **COEX-4.12**, our P&L for fiscal year 2020, in addition to our overhead costs, SMP had, these additional costs: depreciation and amortization of [REDACTED] (line 20), interest expense of [REDACTED] (line 29) and income taxes of [REDACTED], ultimately resulting in a net income margin of [REDACTED] (line 35).

85. The point of my witness statement is not to blame the interactive streaming services for all of the changes that have taken place in the music industry. Instead, I want to make sure that the Judges understand that the growth of the revenues of the interactive streaming businesses and the growth of the royalties that they pay to publishers and writers has neither promoted growth

elsewhere in our ecosystem nor has it replaced the mechanical income that we and our writers previously received, and it is eroding our performance income from other sources. And when one factors in the sharp reduction in mechanical income from the sale of physical records and digital downloads since 2009 against all of the income being generated from interactive audio streaming, the actual income effect of the growth of interactive audio streaming on SMP and its writers is significantly lower than if one simply looks at the interactive audio streaming income in isolation.

86. In fact, I believe, both based on the royalty statements that SMP has received and based on published sources, that a major reason why our mechanical income (and performance income) from interactive audio streaming has not grown more is because the competition between the interactive streaming services for the market has resulted in their having an average revenue per user (“ARPU”) that is far lower than the headline subscription rates which, to the extent royalties are determined by the percent of revenue prong, results in far lower royalty payments to writers and publishers than we should be receiving. While we do not receive ARPU data directly from the MLC, the MLC does provide the requisite information (the number of subscribers and the service revenue) from which one can compute ARPU. Based on the information provided to us by the MLC, set forth in the box below are the ARPU figures SMP has calculated from the data it received from the MLC:

MLC Rate Calc - ARPU				
	Jan. 21	Feb. 21	Mar. 21	Rate Category
Spotify	\$6.32	\$5.86	\$6.63	- Standalone Portable Subscriptions
Apple	\$8.28	\$8.23	\$8.32	- Standalone Portable Subscriptions
Amazon	\$6.87	\$6.92	\$8.10	- Standalone Portable Subscriptions
Pandora Premium	\$8.61	\$8.55	\$8.57	- Standalone Portable Subscriptions

87. These figures, in my view, underscore why we cannot have our royalty income from the interactive audio streaming services be exclusively dependent on their competitive pricing decisions. With a purely percent of revenue rate structure (even one with minimums that do not seem to me to correlate to the revenue rate or other aspects of the rate structure), the Services can use our music and their royalty cost savings to subsidize their unilateral competitive business decisions and grow their revenues in other areas of their ecosystems. If they want to discount their services, their revenue diminution is cushioned by their reduced royalty costs. I strongly believe that without an effective backstop to a percent of revenue structure – whether it is a per stream and/or a per subscriber fee that fairly reflects the value of the songwriters and publishers’ contribution to the interactive audio streaming business, or the protections of having royalties measured by reference to an open market rate (such as with the uncapped TCC structure adopted by the Judges in *Phonorecords III*) – the income of songwriters and publishers will continue to be subject to actions and decisions of the Services over which they have no control and which will continue to suppress the income of writers and publishers.

88. Finally, as I mentioned above, the growth of new audiovisual streaming platforms, including interactive platforms like [REDACTED], have dramatically increased our synch income from blanket licenses of our catalogue. We negotiate licenses with these types of services in an open market and to my knowledge, the market clears.

89. As shown on **COEX-4.5** and **COEX-4.11**, our synch income from such services licensed on a blanket basis, just like the interactive audio services, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

90. While I believe that the rates paid by the interactive audio streaming services remain inadequate and that writers and publishers are hostage to the services' price competition with each other for subscribers and their use of music to drive other parts of their business, I respectfully refer the Judges to the analyses provided by the expert economists for the evidence supporting my belief. As I have said above, it is undisputed that, overall, music publishing income has grown and interactive audio streaming accounts for part of that growth. However, given the dramatic growth of the interactive audio streaming services and their growing domination of the distribution of audio-only content, and given the costs that music publishers must incur, the need to increase our signing of new writers, especially given the growing fractionalization of song splits and the indisputable drop in total mechanical income, I believe that the rates paid by streaming services for the mechanical reproduction of songs should be increased and protections against revenue diminishing strategies of the Services must be a part of any rate structure.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 13, 2021


Thomas Kelly

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21–CRB–0001–PR
(2023–2027)

WRITTEN DIRECT TESTIMONY OF DAVID KOKAKIS

I. INTRODUCTION

1. My name is David Kokakis and I am Chief Counsel of Universal Music Publishing Group (“UMPG”).

2. I submitted a written direct statement and a written rebuttal statement in the prior phonorecords rate-setting proceeding before the Copyright Royalty Board referred to as *Phonorecords III* in support of the Copyright Owners’ direct and rebuttal cases, respectively. A copy of my written direct statement from *Phonorecords III*, which I will refer to herein as the “Kokakis P3 WDT” is attached without its accompanying exhibits (unless those exhibits are otherwise referred to herein) as COEX-5.1, and my testimony therein is incorporated herein by reference.

3. Like my last statement, I make this statement to provide an overview of the role of UMPG and other publishers in the music industry. In this statement, I also discuss some of the pricing, discounting, and other business strategies of the companies that operate digital music services and that are participants in this proceeding (the “Service Participants”), and provide a summary of rates obtained in direct licenses that UMPG has

entered into with digital services for offerings that are subject to the Section 115 compulsory license in the United States (“Eligible Services”), including those offered by Service Participants, as well as in blanket licenses with digital services that are not subject to the Section 115 license and that were negotiated in the free market.

II. MY PROFESSIONAL BACKGROUND

4. I have served as UMPG’s Chief Counsel since July 26, 2018. In my role as UMPG’s Chief Counsel, I lead UMPG’s Business & Legal Affairs team, as well as UMPG’s Digital team. Previously, I was UMPG’s Executive Vice President/Head of Business & Legal Affairs, Business Development and Digital, a position I had held since July 1, 2015.

5. I have been involved in negotiating digital media agreements since joining UMPG in 2009. Among other responsibilities, I oversee the licensing of digital services worldwide, including the licensing of Eligible Services.

6. I have over twenty-five years of experience in the music industry. Before joining UMPG, I practiced entertainment law for over a decade at various firms, including Greenberg Traurig LLP.

III. THE ROLE OF UMPG AND MUSIC PUBLISHERS GENERALLY IN THE MUSIC INDUSTRY

A. Overview

7. As I explained in my *Phonorecords III* witness statement, music publishers are a fundamental driving force in music’s creation and dissemination. Music publishers discover new talent. When music publishers find talented songwriters, they sign them and support them financially through the payment of advances. Music publishers develop songwriters’ careers and nurture their talents by providing resources for them to hone their

craft and to create new songs. They negotiate licenses for the songs on behalf of their songwriters so that the songs may be heard by audiences around the country and around the world. They promote their songwriters to recording artists and record labels as well as to outlets in other industries like film, television, and advertising who are looking to incorporate songs into their works. They match their songwriters with other songwriters for writing collaborations, as well as with the artists and producers who ultimately record the songs. They foster business opportunities for writers. They administer licenses, including by collecting, verifying and processing royalties, make sure songwriters are accurately paid, and provide songwriters with tools to track and analyze their sources of income. And they protect their songwriters' legal rights through copyright registrations, anti-piracy efforts and litigation. In sum, they create and maximize value for songwriters and their works, with an efficiency, reach and expertise that most songwriters could not do on their own.

B. UMPG's Business

8. UMPG is one of the world's largest music publishing companies.

9. Today, UMPG represents music in every genre from some of the world's most important songwriters and catalogs. UMPG currently owns and/or administers an interest in roughly [REDACTED] musical compositions, up from roughly [REDACTED] since my *Phonorecords III* statement.

10. Some of our most widely known and successful songwriters are: ABBA, Adele, Alabama Shakes, The Beach Boys, Beastie Boys, Justin Bieber, Mariah Carey, The Clash, Coldplay, Elvis Costello, Neil Diamond, Bob Dylan, Billy Eilish, Eminem, Gloria and Emilio Estefan, Florence + the Machine, Selena Gomez, Ariana Grande, Al Green,

Halsey, Jimi Hendrix, H.E.R., Sam Hunt, Dua Lipa, Demi Lovato, Carly Rae Jepsen, Billy Joel, Elton John, Joe Jonas, Nick Jonas, The Mamas and The Papas, Post Malone, Maroon 5, Shawn Mendes, Miguel, Nikki Minaj, Mumford & Sons, Randy Newman, New Order, Ne-Yo, Steve Perry, Otis Redding, Pearl Jam, Prince, Red Hot Chili Peppers, R.E.M., Rosalía, Gustavo Santaolalla, Sex Pistols, Carly Simon, Britney Spears, Bruce Springsteen, Taylor Swift, SZA, Justin Timberlake, Shania Twain, U2, Keith Urban, Andrew Lloyd Webber, Jack White, and many others. UMPG is also a global leader in production music, which is music composed primarily for film, television, and advertising.

C. UMPG's Services

11. As I detailed in my *Phonorecords III* statement (Kokakis P3 WDT § II.C), UMPG provides a wide range of services to songwriters that enable them to create songs and develop their careers. A key aspect of our business is talent discovery and development. We find and sign talented songwriters early in their careers and help them realize their potential, both creatively and professionally. This is no simple task. UMPG employs a staff of [REDACTED] artist and repertoire (“A&R”) professionals in the United States, and approximately [REDACTED] worldwide, whose job it is to identify talent. They do so largely by scouting live performances, by listening to demos that are submitted to UMPG, by scouring the internet, and via relationships with other artists and writers.

12. The costs of the search for talented songwriters is high, both in dollars and time. As we often sign songwriters at the earliest stages in their careers, a significant percentage of the songwriters we sign have not yet appeared on a commercially successful recording at the time of signing. Of course, signing unproven talent carries substantial

business risk, and some songwriters do not go on to generate major hits or significant revenue in their careers.

13. In my *Phonorecords III* statement (Kokakis P3 WDT ¶ 14), I identified some of the then-recent songwriters we had signed to new deals in 2015 and 2016, such as singer-songwriters Demi Lovato, Joe Jonas and Shawn Mendes, and “pure” songwriters Talay Riley, DeHeala and Lawrence Taylor. Those references were not anomalous. Year after year, UMPG continues to discover and sign some of the most creative and groundbreaking writers in the industry. Since 2016, UMPG signed new deals with, among others, the following songwriters (with some of the hit songs they wrote or co-wrote in parenthesis): songwriter/artists Billie Eilish (“bad guy,” “lovely”), Bad Bunny (“MÍA”), Dua Lipa (“Levitating,” “Love Again”), and Halsey (“Closer,” “Without Me,” “Eastside”); and producer-songwriters or “pure” songwriters Louis Bell (“Sunflower,” recorded by Post Malone, “Havana,” recorded by Camilla Cabello, “Peaches,” recorded by Justin Bieber); Take a Daytrip (“Montero (Call Me By Your Name),” recorded by Lil Nas X); Nija Charles (“Positions,” recorded by Ariana Grande, “Rain On Me,” recorded by Lady Gaga, “No Guidance,” recorded by Chris Brown); Tommy Brown (“Thank U, Next” and “7 Rings,” recorded by Ariana Grande); Omer Fedi (“Stay,” recorded by The Kid Laroi featuring Justin Bieber, “Mood,” performed by 24kGoldn); and Cardo (“Laugh Now Cry Later,” recorded by Drake, and “Goosebumps,” recorded by Travis Scott).

14. As is usually the case, about half of the songwriters we signed since 2016 were relatively unknown and less established when we signed them.

15. In my *Phonorecords III* statement, I also provided some examples of the many different ways that UMPG’s creative teams go about discovering and signing

songwriters, including through our relationships with artists, producers, record label executives, managers, attorneys and other UMPG songwriters, and scouring various websites, blogs and internet sources. (See Kokakis P3 WDT ¶¶ 16-19.) While our A&R team continues to employ with tenacity (and at significant cost) those means of discovering new talent, it remains true that most leads ultimately do not result in signing a writer. Nevertheless, despite the long odds, our creative teams do continue to unearth great new songwriters.

16. As I noted, we regularly identify new writers to sign as a result of our strong partnerships with many high-profile UMPG artist-songwriters. For example, our relationship with artist-songwriter Future allowed for the discovery of producer-songwriter D. Hill, who co-wrote a Number 1 song, “Life Is Good,” recorded by Future and Drake. Similarly, artist-songwriter Big Sean introduced us to producer-songwriter Oba, artist-songwriter Lil Baby introduced us to producer-songwriter Chi Chi, and artist-songwriter KillaGraham introduced us to producer-songwriter Kenny Beats.

17. We also often discover new writers by painstakingly monitoring online sources and evaluating the songwriters’ works on those sources. For example, recently one of our Directors of A&R, Taylor Testa, identified singer-songwriter Ryan Santiago p/k/a Royal & the Serpent from her rising appearances on [REDACTED]. Similarly, Taylor also discovered singer-songwriter Matt Maeson on [REDACTED].

18. Due to the enormous amounts of time, money and other resources we provide to our songwriters, and the inherent risks borne by UMPG by investing in them, we must carefully vet each lead to confirm that we can provide value to the songwriter’s career, and that there is creative compatibility between the songwriter and the A&R team.

Although this process can take several months, it is essential because we operate on margins too small to not critically examine the potential relationship prior to entering into an agreement with a songwriter.

19. Once we sign a songwriter, we provide her with an array of services to help her write great songs and develop her career. As a starting point, we generally pay her an advance, the purpose of which is to enable the songwriter to support herself while she writes, and to focus full-time on songwriting, before she has generated any income from license fees and other sources. The amount of the advance varies based on various factors, including the songwriter's track record, and is subject to negotiation. The advances we pay typically run from [REDACTED] for a newly discovered, not yet successful songwriter, and can be higher for experienced songwriters with a proven track record. Our Global Chief Financial Officer, JW Beekman, further discusses advances in his Written Direct Testimony in this proceeding ("Beekman WDT").

20. UMPG typically seeks to recoup the cost of the advance from the royalties, if any, earned from licenses of the songwriter's works (generally, mechanical, synchronization, print, merchandising, and the publisher's share of public performance royalties). The writer's share of public performance royalties is almost always paid directly to the songwriter by the songwriter's performing rights organization and is not generally available to recoup the advance. Of course, the royalties earned may be (and frequently are) less than the amount of the advance paid by UMPG—in some cases significantly less—in which case UMPG is, with rare exception, never repaid by the songwriter concerned. I discuss songwriter advances in further detail in Section III.D below.

21. We also assign each of our songwriters to a professional creative team comprised of [REDACTED]. The creative team provides support and guidance to the songwriter and, particularly for newer songwriters, helps the writer develop her sound so she can reach her full potential as a commercially successful songwriter.

22. The creative team also, among other things, identifies co-writing opportunities and collaborations with songwriter-producers. As I discussed in my *Phonorecords III* statement, many of our songwriters have found great success through the collaborations arranged by members of our creative team, including pairings that have resulted in chart-topping hits. (See Kokakis P3 WDT ¶ 23.) For example, UMPG was instrumental in bringing together writer-producers Take a Daytrip and Omer Fedi, who collaborated on the song “Montero (Call Me By Your Name),” and introducing Omer and Blake Slatkin, who were co-writers of the song “Stay,” which has been a fixture on the global Billboard charts in 2021. Our A&R team also created writing sessions with UMPG writer Delacey and songwriters Amy Allen and Louis Bell, which led to the hit song “Without Me,” recorded by Halsey.

23. Our creative team has also arranged successful collaborations for songs that have been included in major motion pictures. Recently, we coordinated the collaboration of UMPG writer Sam Ashworth and actor/singer-songwriter Leslie Odom Jr. on “Speak Now,” written for the film “One Night In Miami.” The song went on to be nominated for numerous awards, including the Academy Award for Best Original Song. It lost the Oscar, however, to “Fight For You,” featured in the film “Judas and the Black Messiah.” That song was co-written by UMPG songwriter Tiara Thomas and UMPG singer-songwriter

H.E.R., also as a result of a collaboration arranged by UMPG. As is frequently the case with our songwriters, while H.E.R. is a UMPG songwriter, she is not signed to Universal Music Group as a recording artist, but rather, is signed to a record label unaffiliated with UMG.

24. One of the ways we foster new collaborations among our songwriters is by hosting songwriting sessions centered around a particular theme, project, or recording artist. These events are held several times a year and include some recurrent series, such as the “She Is The Music” series, in which all attendees are women songwriters and producers, and the “Nightshift” series, in which all sessions are dedicated to writing Progressive R&B songs. UMPG covers all costs associated with running these events.

25. Our creative team also promotes our songwriters to recording artists and producers who may be looking for a musical composition of a certain genre or style, and to record labels who we think might be interested in signing the songwriter as a recording artist. Our songwriters benefit from UMPG’s decades of industry experience, connections and reputation, which enable us to connect our songwriters with labels, artists and producers who also can help further their goals.

26. For example, many of the co-writers who created works on singer-songwriter H.E.R.’s latest album, “Back of My Mind,” were introduced to the artist by UMPG’s Co-Head of A&R, Walter Jones. Although, in the past, this is a role that would have ordinarily been played by a record label, I find UMPG is increasingly performing this task. In this case, Walter was perfect for the job as he has been working with H.E.R. for many years and has helped the singer-songwriter develop her musical expression from a

young age. The strength and quality of Walter's creative relationship with H.E.R. enabled him to bring other UMPG writers into the project who suited H.E.R.'s style and direction.

27. UMPG has also been instrumental in helping many artist-songwriters obtain record deals by introducing them to our many contacts in the record industry. In fact, on numerous occasions, UMPG has signed an artist-songwriter after he or she was dropped from a label and worked with the writer to write new songs, which resulted in the writer getting a new label deal. In my *Phonorecords III* statement, I told the stories of songwriters Skylar Grey, Sterling Simms and Prince Charlez, each of whom were dropped by their record labels before signing with UMPG, only to achieve commercial success thereafter and sign new record deals. (*See Kokakis P3 WDT ¶¶ 26-27.*)

28. We also often assist our songwriters in obtaining their first record deals. After UMPG signed the songwriting duo Grey, A&R Director Taylor Testa assisted Grey in obtaining a record deal with Arista Records by introducing Grey's management to executives at several record labels, including at Arista. Another example is singer-songwriter Upsahl, who has worked with UMPG since early in her career. The A&R team recognized Upsahl's budding talents and helped her refine her sound as a songwriter and artist by, among other things, holding many writing sessions and experimenting with different collaborators. This development work paid off for Upsahl; she eventually signed with Arista Records as well.

29. Given our extensive industry contacts and close relationships with our writers, it is not uncommon for us to also assist our songwriters in finding a suitable manager. For example, members of our A&R team have introduced writers Madi Yanofski, Delacey and Joe Janiak to their respective managers.

30. UMPG also provides our songwriters with substantial resources for creating the perfect demonstration or “demo” recording. Demos are an important tool for songwriters to market their songs and it is therefore imperative that the demo recordings be of the highest quality. We provide our songwriters with access to state-of-the-art recording studios and writing rooms to achieve that goal. The A&R teams assigned to our songwriters also provide their professional guidance and feedback on writers’ demos in order to improve the final products. A&R’s feedback can be as specific as critiquing or making suggestions to a song’s lyrics and/or arrangement (e.g., suggesting that the bridge of the song should actually be the chorus), or as general as advising a writer that he or she should continue to spend more time on a particular song or demo recording, or to revisit a song or demo the writer had previously abandoned.

31. UMPG also promotes its songwriters and their works through synchronization licensing. This work is done both for our current songwriters and for catalog titles. Our Synchronization Department executives leverage their contacts in the motion picture, television, and advertising industries, in addition to UMPG’s extensive catalogue and roster of songwriters, to both get songs placed in movies, television shows and advertising projects, and to collaborate with audiovisual creators to create original content for their projects.

32. Our creative teams also hold songwriting camps for synchronization placement in commercials, films and television shows several times a year in New York, Nashville and Los Angeles. UMPG gathers small groups of songwriters to create songs, sometimes with a specific company, commercial, movie, television show, or project in

mind. Our creative personnel coach these sessions, providing their guidance and feedback on the sonic, lyrical and production aspects of the songs being created.

33. Sometimes, the works created during a songwriting camp are not selected for the particular project in mind. In these instances, our Synchronization Department endeavors to find other opportunities for these songs and the writers who created them. For example, the song “War Cry,” written by David Frank, was not selected for the sync placement for which it was originally intended, so the synchronization team took the demo and promoted it to artists and record labels. The song was picked up and released by recording artists Social Club Misfits, and has since been streamed millions of times.

34. UMPG’s identification of synchronization placements for our songwriters is a critical component to disseminating our songwriters’ works and cultivating their careers. As I discussed in my *Phonorecords III* statement, in many cases, synchronization licenses do more than just earn royalties for a writer—they sometimes draw the attention of record labels to a singer-songwriter who had previously been neglected. (See Kokakis P3 WDT ¶ 30.) For example, UMPG placed the song “I Found U,” written by Michael Angelakos, who records as Passion Pit, in a Frito-Lay advertising campaign in 2019. Prior to this, Passion Pit had not released a single since 2015. The placement of “I Found U” highlighted the song for Passion Pit’s label, Columbia Records, as it was not a song that had been prioritized, and ultimately released the song as a single in 2019.

35. In other instances, sync placements have propelled the careers of our songwriters. In my *Phonorecords III* statement, I described how Justin Davis and Sarah Zimmerman signed a record deal with Capitol Records after several of their songs were placed on the television show “Nashville.” (See Kokakis P3 WDT ¶ 30.) More recently,

UMPG's Synchronization Department placed the song "Dream Girl," co-written by Norwegian singer-songwriter Anna of the North and writer John Lister in an Apple iPad Pro campaign, which led to a surge in streaming activity and sales of the song. This sync success story was documented in a column published by *Variety* magazine, attached hereto as COEX-5.2.¹ UMPG had also placed another one of Anna's songs, "Lovers," in the film "All The Boys I've Loved Before," which was also a huge success. That particular placement introduced Anna to a new audience and helped grow her U.S. fanbase to such an extent that she was able to secure her first U.S. tour.

36. In other cases, synchronization uses licensed by UMPG have resulted in a resurgence of interest in a song that had slipped from the spotlight, and which ultimately led to increased sales of recordings of the song. For example, we recently placed various songs recorded by Prince in the television series "Black-ish," which exposed a new generation of music listeners to Prince. Similarly, our placement of Don McLean's "American Pie" in an episode of "Zoey's Extraordinary Playlist" resulted in increased consumer interest in that song.

37. In addition to synchronization licensing, UMPG engages in a host of other licensing activities relating to its writers' works, including mechanical licensing, sample licensing, lyric reprint and sheet music licensing, and, of course, digital licensing. Although performance rights are generally licensed by performing rights organizations or societies ("PROs"), UMPG in some cases also licenses those rights directly. UMPG also helps foster business opportunities for songwriters, including in new media. For example,

¹ COEX-5.2 (Andrew Hampp, *Songs for Screens: Anna of the North Talks Netflix, "Dream Girl" Apple Spot*, *Variety Magazine* (May 14, 2020), <https://variety.com/2020/music/news/apple-dream-girl-netflix-to-all-the-boys-anna-of-the-north-1234606719>).

we have been very active in the non-fungible token or “NFT” space, seeking to create opportunities and value for writers in this new medium.

38. Another one of UMPG’s important functions for our songwriters and the dissemination of their works is song administration. As I explained in my *Phonorecords III* statement, when UMPG obtains rights in a song, our staff inputs writer share, publisher share, and territory of control information (among other information relating to UMPG’s rights in the applicable song) into a global song administration database developed by UMPG and utilized by all of UMPG’s worldwide offices. (See Kokakis P3 WDT ¶ 33.) The UMPG database also automatically creates electronic song registration files, which are submitted monthly to PROs and rights management organizations around the world, including to the MLC and to PROs in the United States. In territories where electronic song registrations are not accepted by the relevant organization, UMPG manually registers the songs with the organization utilizing the organization’s required protocol. UMPG also registers contract summaries, which contain details about UMPG’s new signings, with PROs and other relevant rights management organizations, and cue sheets, where relevant and required, which help track music used in movies and television.

39. UMPG collects royalties for its songwriters in every country in the world that enforces copyright laws. There are ■ employees in UMPG’s Royalty Department located in the U.S. and approximately ■ people globally in its Royalty, Copyright and Income Tracking Departments. After UMPG branch offices have collected royalties in their territories, UMPG’s office in Franklin, Tennessee acts as a royalty clearing house. Once that office has processed the royalties for a song, it pays out the royalties to the appropriate branch offices around the world. By centralizing royalty processing in this

manner, UMPG is able to maintain a database of global earnings history for every one of its songs.

40. UMPG also provides its songwriters with a state-of-the-art royalties and copyright portal, which provides them with extensive royalty data and analytical tools to understand where, when and how their songs are exploited around the world, as well as copyright information and the registration status of all works. UMPG was the first major global music publisher to provide this kind of service, and in January 2020, we launched the next generation of our portal, called “UMPG Window,” along with an accompanying mobile app. The portal now uses cloud-indexing technology and has increased reporting and functionality for searching and analyzing royalty data. Additionally, users can see real-time account balances, including pipeline royalties, for which they can request advance payments from UMPG with no fees. Over the last five years, we have invested roughly [REDACTED] in our royalties and copyright portal.

41. Additionally, the Income Tracking Department monitors payments worldwide to verify that all songs on a release are paid at the correct rate and that proper payments are received and credited, including for performance royalties. The Income Tracking Department is also responsible for ensuring that UMPG is paid advances and minimum guarantees required under its license agreements.

42. UMPG further advances its songwriters’ interests by handling copyright-related tasks. This involves, among other things, registering our songwriters’ works with the U.S. Copyright Office and monitoring those registrations, and other copyright-related tasks such as enforcing and maintaining our ownership claims vis-à-vis other copyright owners. Without this administration investment and ongoing work, UMPG would not be

able to maintain and continue to grow its large catalog, which it can make available to digital services on blanket terms, enabling their business models based on providing consumers with bulk access to music and substantially reducing their costs to run those services. UMPG also works with digital services and other third parties to ensure that they have systems in place that allow for uses of musical works to be recognized and claimed.

43. UMPG expends significant financial and other resources to deter infringers and protect our songwriters' copyrights. Our Content Protection Team engages in anti-piracy initiatives, including monitoring online infringement of UMPG's songwriters' works and issuing DMCA take-down notices for UMPG content across various platforms and websites. The Content Protection team also provides bespoke takedown programs for UMPG's writers, targeting specific websites and services. We also have an in-house team devoted to claiming and blocking works on YouTube. And we have retained TuneSat, a third-party service which also monitors online outlets such as Instagram and YouTube, and broadcast TV, for unauthorized uses of UMPG works.

44. We remain vigilant of new technology and new platforms through which infringements of our songwriters' works occur, and we engage with those platforms to obtain compensation for past acts of infringement and to enjoin future unlicensed use or to sign licensing deals for such use. For example, we recently pursued and then engaged in direct negotiations with service providers using our music without license, including [REDACTED], and were ultimately able to resolve our disputes and reach agreements with those services so that our writers were paid. We have been actively involved in cases against ISPs, such as Cox and Charter-Brighthouse, who contribute to rampant infringement of musical work copyrights through deliberately weak and ineffective repeat infringement

policies. We have also pursued or are currently pursuing infringers who have used our music in commercials (e.g., [REDACTED] [REDACTED]) on websites and in podcasts (e.g., [REDACTED] [REDACTED]); in workout programs ([REDACTED]); and in karaoke recordings ([REDACTED]). This work protects our songwriters, but also protects the Eligible Services, as it substantially reduces piracy and helps to create a level playing field for licensed platforms.

D. UMPG’S Revenues And Costs

45. As I stated in my *Phonorecords III* direct statement, and which remains true today, UMPG’s success rises and falls with that of its songwriters. (See Kokakis P3 WDT ¶ 39.) The company’s compensation originates from our agreements with our songwriters, which provide for payment to UMPG of a share of the songwriters’ royalties in exchange for the services I describe above. Most of our agreements with our songwriters are “co-publishing” or similar agreements, in which the songwriter’s share of royalties is generally 75% and the publisher’s share is 25%. While there remain some so-called “traditional” songwriting contracts, where the songwriter’s share of royalties is 50% and the music publisher’s share is 50% (generally older agreements for catalog works), those agreements are far less common these days. There are also “administration agreements,” where the songwriter receives 100% of the royalties after the publisher deducts an administration fee of generally [REDACTED], sometimes less. With the exception of the recoupment of the advance paid to the songwriter (discussed below), our agreements generally do not call for significant deductions against the songwriters’ royalties, differentiating them from typical agreements between recording artists and record companies, which usually call for

deductions against artist royalties for various costs incurred by the record company like packaging, manufacturing, recording and video costs.

46. Our songwriter contracts typically include an advance payment to the songwriter. The intention of an advance is to ensure that a songwriter can focus on his or her craft rather than having to find other means of financial support. Advances are particularly critical for emerging songwriters because it can take a year or two from the time a song is actually created and recorded for it to generate any revenue for the songwriter.

47. The payment of an advance against future, unearned royalties is, of course, risky, and has been made more so over the last several years [REDACTED]. While UMPG generally expects to recoup the advance from the royalties earned from licenses of the songwriter's works, frequently the royalties earned are less than the amount of the advance, and so UMPG is in many cases never repaid. Despite this, UMPG recognizes the importance of advances to the signing and development of songwriters, and thus, they constitute a substantial yearly expenditure by UMPG.

48. While we hope that in any given year our annualized amount of advances will be recouped in an amount equal to or greater than our outlay, as further described in the direct witness testimony of UMPG's Global Chief Financial Officer, JW Beekman, [REDACTED]

[REDACTED]. (See Beekman WDT ¶ 23.) [REDACTED]

49. In addition to advances, we incur other substantial costs in fulfilling the important roles discussed above. As set forth in greater detail in JW Beekman's written direct testimony (Beekman WDT ¶¶ 29-30, 39, 42; COEX-1.2), [REDACTED]

[REDACTED]. Some of these [REDACTED] were due in part to the fact that we have continued to sign and develop more songwriters and acquire more existing catalog musical works.

IV. THE CURRENT STATUTORY MECHANICAL RATES AND TERMS REMAIN INADEQUATE

50. As I testified in the *Phonorecords III* proceeding (Kokakis P3 WDT ¶¶ 45-47), interactive streaming and limited download services have become the primary way in which consumers enjoy music, replacing the purchase of CDs and permanent downloads. The shift from an ownership model to an access model has only accelerated since the time of my *Phonorecords III* statement. According to RIAA statistics, revenues from streaming services (including on-demand subscription services, ad-supported services, and non-interactive services) as a share of total US recorded music industry revenues have, since the time of my last statement, only continued to grow, reaching 83% in 2020.² Subscription revenue from streaming grew from \$639 million in 2013, to \$2.5 billion by 2016, to \$7

²See COEX-5.3 (Joshua P. Friedlander, RIAA, Year-End 2020 RIAA Revenue Statistics, <https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf>).

billion by 2020.³ As one of the Exhibits attached to JW Beekman’s statement show, by year-end 2020, [REDACTED]

[REDACTED]. (Beekman WDT, COEX-1.3.)

51. The companies that operate Eligible Services have benefitted tremendously from this massive shift in the industry. Not only have their revenues grown, but so have their enterprise values. For example, Spotify’s market capitalization and enterprise value have roughly doubled from 2018 to the present, and Spotify reports that it now has over €3 billion on hand in cash and cash equivalents, restricted cash, and short-term investments.⁴ Our songs—the number of which has, since the *Phonorecords III* proceeding, increased from roughly [REDACTED]—together with those of other publishers, are the driving force for growth and consumer interest, and these services would not have achieved their tremendous success without them. To consumers, the value of these services lies almost entirely in the on-demand access they provide to all of the tens of millions of songs that music publishers and songwriters create and license to these services. And advertisers

³ *Id.*; COEX-5.4 (Joshua P. Friedlander, RIAA, News and Notes on 2016 RIAA Shipment and Revenue Statistics, <https://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf>); COEX-5.5 (Joshua P. Friedlander, RIAA, News and Notes on 2015 RIAA Shipment and Revenue Statistics, <https://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf>).

⁴ *See* COEX-5.6 (Market Capitalization of Spotify (SPOT), <https://companiesmarketcap.com/spotify/marketcap/>); COEX-5.7 (Total Enterprise Value (TEV) for Spotify Technology S.A., https://finbox.com/NYSE:SPOT/explorer/total_enterprise_value); COEX-5.8 (Spotify Technology S.A. Announces Financial Results for First Quarter 2021 (Apr. 28, 2021), <https://investors.spotify.com/financials/press-release-details/2021/Spotify-Technology-S.A.-Announces-Financial-Results-for-First-Quarter-2021/default.aspx>).

pay these services to serve targeted advertisements to users who are willing to listen to or view those advertisements only so that they may access these tens of millions of songs.

52. As I further testified in *Phonorecords III* (Kokakis P3 WDT ¶¶ 48-54), these Eligible Services do not adequately compensate songwriters and publishers for the use of their songs. The experimental *Phonorecords II* rates were too low—a view as to which I understand the Board in its *Phonorecords III* Final Determination agreed, as did the D.C. Circuit—and, as discussed herein, even the phased-in increases to the headline rates that the Board deemed appropriate (but which Service Participants challenged and continue to challenge) barely moved the needle given the Service Participants’ strategies to massively discount their music services in an effort to capture consumers and gain market share. And, as explained in the testimony of JW Beekman, mechanical income from physical copies and digital downloads of recordings [REDACTED].

53. Indeed, the effective per-stream payments paid to UMPG by the services continue to remain shockingly low. As I testified in *Phonorecords III* (Kokakis P3 WDT ¶ 48), Spotify, for example, in 2016 paid UMPG (under the *Phonorecords II* rates) a miniscule [REDACTED] per stream for its subscription tier and [REDACTED] per stream for its free-to-the-user, “advertiser-supported” tier. At the *Phonorecords III* rates, while they were in effect, Spotify paid UMPG even less on a per-stream basis: only [REDACTED] for its subscription tier and [REDACTED] for its ad-supported tier in 2018, [REDACTED] for its subscription tier and [REDACTED] for its ad-supported tier in 2019, and [REDACTED] for its subscription tier and [REDACTED] for its ad-supported tier in Q1-Q3 2020.

54. I believe that the discounting and bundling strategies that Service Participants employ for their own business reasons, *i.e.*, to capture market share and long-

term customer value, are the primary reasons for these low per-play rates. This is demonstrated in part by Service Participants' declining average revenue per user ("ARPU"). As reported in Billboard, by 2020, Spotify's global ARPU was just \$3.25 per month, down nearly 40% from 2015.⁵ While capturing long-term subscriber value may be good for Spotify and the other Service Participants, that should not come at the expense of the songwriters driving those profits.

55. Relatedly, we were quite surprised in 2019 when [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. But because Spotify took full
advantage of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], while they and other Service Participants
were simultaneously fighting to reinstate the *Phonorecords II* rates and terms.

56. The foregoing, to me, demonstrates that, given the business strategies of Spotify and the other Service Participants, the Board needs to eliminate the ability of

⁵ See COEX-5.9 (Glenn Peoples, *Spotify's ARPU Drops, Subscriber 'Lifetime Value' Has Grown*, Billboard (June 3, 2021), <https://www.billboard.com/articles/business/9582011/spotify-average-revenue-per-user-arpu-creators-value/>).

Eligible Services to discount compulsory mechanical royalties when they choose, for their own business reasons, to offer family, student, or other discounts.

**V. THE SERVICES ARE DEMONSTRABLY NOT ENGAGING
IN PRICE DISCRIMINATION TO INCREASE THE REVENUE
PIE TO BE SHARED WITH COPYRIGHT OWNERS**

57. As I read the Final Determination in *Phonorecords III*, the Judges adopted a revenue-based rate structure similar to, but simplified from, the *Phonorecords II* structure—and did not adopt the Copyright Owners’ per-play rate structure—because they believed that a revenue-based structure facilitates beneficial price discrimination and allows lower willingness-to-pay consumers to access music, thereby increasing the total revenue pie. Again, I believe that the Service Participants’ discounting and pricing strategies are less about capturing low willingness-to-pay consumers than about competing with other services and trying to acquire customers who provide benefits to them in other business lines. The following example perhaps best illustrates the point.

58. Most Eligible Services offer music in a compressed or “lossy” .mp3 format (*i.e.*, some information in the file is eliminated in order to maximize playback capabilities). I understand that Spotify, for example, streams music in a “lossy” format at a bit rate of between 96 kbps to 320 kbps (on the “very high” Premium subscriber setting). Generally speaking, bit rate corresponds to audio quality; the higher the bit rate, the higher the audio quality.

59. High-fidelity or “lossless” audio uses compression technologies that do not discard any of the music file’s data, so listeners can access a perfect, bit-for-bit reproduction of the original audio. Such audio is streamed at a significantly higher bitrate, usually 1,411 kbps. At the time of *Phonorecords III*, there were services in the marketplace

that were streaming high bit-rate “lossless” music files of at least CD-quality, sometimes referred to as “high-definition” audio, but these services—including Tidal and Deezer—were and still are charging consumers a premium price for such premium audio quality.

60. Tidal, for example, has offered and continues to offer a “high-definition” version of its Eligible Service (Tidal Hi-Fi) at a premium price of \$19.99/month. It also offered and continues to offer a standard “lossy” version of the Service at the \$9.99/month price point. Tidal marketed and continues to market its \$19.99 Hi-Fi service to audiophiles who value the difference in sound quality and who possess high-end audio equipment capable of expressing that difference, including by touting its “partner integrations” with purveyors of such equipment (including MacIntosh, Cambridge Audio, KEF, and DENON).⁶ Deezer and Qobuz continue to offer high-definition tiers (Deezer HiFi and Qobuz Studio, respectively) for \$14.99/month.⁷ The approach of Tidal, Qobuz and Deezer clearly represents the use of price discrimination to capture two different types of listeners who place different value on sound quality.

61. Contrast the approach of those offering a premium product at a premium price to consumers who have the equipment to discern and can pay for the difference in sound quality with that of the Service Participants in this proceeding. In February of this year, Spotify announced that it would be offering to Premium subscribers in select markets the ability to upgrade their sound quality to a lossless, high-resolution tier called “Spotify HiFi.” Spotify said that its high-resolution HiFi tier “will add cost to the Premium

⁶ See COEX-5.11 (Tidal Sound Quality, <https://tidal.com/sound-quality>).

⁷ See COEX-5.12 (Deezer HiFi, <https://www.deezer.com/us/offers/hifi>).

subscription fee,” although Spotify did not announce the exact amount of the price uplift.⁸ Spotify specifically touted the HiFi service as being able to deliver lossless audio to “Spotify Connect-enabled speakers,” and said that it was “working with some of the world’s biggest speaker manufacturers to make Spotify HiFi accessible to as many fans as possible through Spotify Connect.”⁹ Spotify’s announcement that it would price this high-end tier—marketed to audiophiles who already own sophisticated equipment or would purchase such equipment from Spotify’s partner manufacturers—at a level higher than its standard tier, was consistent with industry practice, as noted above.

62. However, in May of this year, before Spotify could release HiFi, Apple announced that it would offer Lossless Audio streaming of its entire catalog to subscribers to Apple’s standard Apple Music subscription service “at no additional cost.”¹⁰ Apple also announced that “[t]housands of tracks will be available” to such subscribers, with more to be added, in another even higher quality lossless, high-definition format—“Spatial Audio with Dolby Atmos”—also at no additional cost. Apple’s Eddie Cue described Dolby

⁸ See COEX-5.13 (Stan Horaczek, *Spotify has a major audio-quality upgrade coming later this year*, Popular Science (February 22, 2021), <https://www.popsci.com/story/technology/spotify-high-res-streaming-quality/>); COEX-5.14 (Stream On: Five Things to Know About Spotify HiFi (February 22, 2021), <https://newsroom.spotify.com/2021-02-22/five-things-to-know-about-spotify-hifi/>); COEX-5.15 (Nick Pino, *Spotify HiFi Release Date, Price, Quality, Features, Rumors and Song Catalog*, Tech Radar (August 15, 2021), <https://www.techradar.com/news/spotify-hifi-release-date-price-quality-features-rumors-and-song-catalog>).

⁹ See COEX-5.14.

¹⁰ In our voluntary deal with [REDACTED]

[REDACTED] See COEX-5.16

[REDACTED]).

Atmos as follows: “it makes you feel like you’re onstage, standing right next to the singer, it makes you feel like you might be to the left of the drummer, to the right of the guitarist.”¹¹ Apple says “music created in Dolby Atmos is freed from channels, allowing artists to place individual sounds all around you.”¹² Not surprisingly, Apple promotes the benefits of Dolby Atmos for listening through Apple products: “By default, Apple Music will automatically play Dolby Atmos tracks on all AirPods and Beats headphones with an H1 or W1 chip, as well as the built-in speakers in the latest versions of iPhone, iPad, and Mac.”¹³ There can be no question that Apple is giving away a product that is usually sold at a premium price to audiophiles with a greater willingness to pay for high-definition audio so that it can capture market share and long-term customer value and sell Apple headphones, iPhones and computer products—products whose revenues are not part of the revenue on which our royalties are based.

63. *On the very same day* in May that Apple announced it would be giving away lossless audio, Amazon too declared that it would offer its lossless, high-definition audio service tier (“Amazon HD”) for free to subscribers to an Amazon Unlimited individual or family plan.¹⁴ Amazon had previously (since 2019) been offering lossless audio to

¹¹ See COEX-5.17 (Chris Welch, *Apple Music’s Spatial Audio Is Sometimes Amazing But Mostly Inconsistent*, The Verge (June 9, 2021), <https://www.theverge.com/2021/6/9/22525028/apple-music-spatial-audio-dolby-atmos-hands-on>).

¹² *Id.*

¹³ See COEX-5.18 (Apple Press Release, *Apple Music announces Spatial Audio with Dolby Atmos; will bring Lossless Audio to entire catalog* (May 17, 2021), <https://www.apple.com/newsroom/2021/05/apple-music-announces-spatial-audio-and-lossless-audio/>).

¹⁴ See COEX-5.19 (Amazon Press Release, *Amazon Music HD For All, Now at No Extra Cost* (May 17, 2021), <https://www.businesswire.com/news/home/20210517005546/en/Amazon-Music-HD-For-All-Now-at-No-Extra-Cost>).

subscribers for an additional \$5 per month (on top of the cost of the Amazon Unlimited plan, which is \$9.99/month for individual subscribers, \$7.99/month for Prime members, and \$3.99/month for use on Echo devices). It obviously believed in 2019 that audiophiles were willing to pay an additional \$5/month for premium audio. But in May 2021, it cut the price to compete with Apple for market share. One can only expect that Spotify will soon announce that it too will not charge more for Spotify HiFi.

**VI. THE COPYRIGHT OWNERS' PROPOSED RATES AND TERMS
FULFILL THE WILLING BUYER AND WILLING SELLER
RATE STANDARD**

64. The Copyright Owners' proposed rates and terms, in my view, best comport with the Music Modernization Act's new rate standard, that is, they "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."¹⁵ I say this for several reasons.

65. When we negotiate rates with digital streaming services in the free market, *i.e.*, outside the scope or shadow of a compulsory license, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ 17 U.S.C. § 115(c)(1)(F).

[REDACTED]

[REDACTED]

66. I do not believe agreements made with Eligible Services for rights that are subject to the compulsory license are appropriate benchmarks for determining the statutory rate, particularly under the willing buyer/willing seller rate standard that now governs this proceeding. Due to the ability of the Services to obtain the compulsory license, we are compelled, not willing, sellers in those cases, and the statutory rate acts as a ceiling on what we can obtain in negotiations for those rights. [REDACTED]

[REDACTED]¹⁶ However, those deals do not show any preference for the *Phonorecords II* rates that Service Participants continue to argue for in the remand proceeding; nor do they show that the *Phonorecords II* rates would be the rates negotiated between a willing buyer, and a willing seller unconstrained by the compulsory license. In fact, if anything, these deals show a current preference for at least the rates and terms determined by the Judges in the *Phonorecords III* Final Determination, [REDACTED]

[REDACTED]

[REDACTED].

16 [REDACTED]

[REDACTED]

**A. Deals with Streaming Services in the US
for Rights Not Covered Under Section 115**

i. Blanket Licenses for Audiovisual Streaming Services

67. Audio-only streaming services subject to the compulsory license are not the only game in town for consumers to access our catalog of musical works. We routinely enter into blanket licenses to reproduce and distribute our entire catalog (in some cases, with very limited restrictions placed on us under songwriter agreements) via interactive audiovisual streaming services. By these agreements, just as we do in our blanket license agreements with Eligible Services, we grant to the streaming service the right to reproduce and distribute our catalog, as embodied in audiovisual works, on an “on-demand” basis to subscribers or other users of the streaming service.

68. While I have heard people refer to these types of agreements as “synchronization” licenses, I disagree with that characterization. Unlike the typical synchronization license, where individual songs are licensed for a specific use in a film, commercial or television show, by these agreements with interactive audiovisual services, we are not licensing a particular musical work for use in a television program, film, commercial or other particular audiovisual work. With synchronization licenses, the licensee can select from any number of different musical works or sound recordings embodying musical works to use in the audiovisual work. In contrast, in these blanket licenses with audiovisual streaming services, we are granting the service the right to reproduce and stream on-demand to its users any work on its platform that embodies any

one of our musical works.¹⁷ The rights granted include reproduction rights that are akin to the mechanical reproduction right.¹⁸

69. Moreover, these audiovisual streaming services compete with the Service Participants and other Eligible Services. As Goldman Sachs recently reported, on-demand short-form video and fitness services—services that heavily rely on music and that we license on a blanket basis but that are not subject to the compulsory license—surged in popularity during COVID-19 and do and should continue to appeal to varied and younger audiences.¹⁹ YouTube’s audiovisual service is a chief competitor to Spotify, Apple, Amazon and Pandora. Goldman Sachs further noted that YouTube Music/Premium is one of the fastest growing services globally.²⁰

70. In my *Phonorecords III* testimony (Kokakis P3 WDT ¶¶ 87-91), I described some blanket license agreements we made with audiovisual streaming services that required licenses both from us and from record companies and that included a “most favored nations” (“MFN”) or similar provision that ensured that we would be paid royalties at the same rate or the same fee as record labels, including [REDACTED].²¹ These types of agreements

¹⁷ Many of these services do not themselves select the recordings or works used on their platforms; rather, the choice is made by individual users or others (such as instructors), which is why a blanket license is particularly necessary.

¹⁸ UMPG’s Synchronization Department, which is responsible for traditional sync licenses for film and television and commercials, among other things, does not negotiate these licenses; they are negotiated by my digital group under my supervision.

¹⁹ See COEX-2.9 (Goldman Sachs, *Music in the Air* (April 26, 2021)) at 11.

²⁰ *Id.* at 8.

²¹ In many cases, [REDACTED]

demonstrate that digital streaming services, negotiating in a truly free market not subject to or influenced by the U.S. statutory compulsory license, consider the musical works to have the same value as the sound recordings. We have since *Phonorecords III* continued to enter into these types of agreements. For example, in the deals we made with [REDACTED], respectively, in 2020 and 2021, the services agreed to pay us our market or pro-rata share percentage of [REDACTED].²² [REDACTED]

[REDACTED]²³

71. This parity with record companies exists across numerous of these platforms that share these same core characteristics with interactive audio-only streaming—full catalog, on-demand use for digital platforms running consumer applications—and one distinguishing characteristic: they do not fall under the compulsory license because of the historical quirk that divided audio-only and audiovisual uses.²⁴

72. When we grant blanket licenses to interactive audiovisual services, again because they are outside of the scope of the compulsory license, we are in most cases able to [REDACTED]

[REDACTED]

²² [REDACTED]

²³ See COEX-5.23 ([REDACTED] CO EX-5.24 [REDACTED])

²⁴ Player pianos and early motion pictures were fundamentally different uses of music. [REDACTED] are not; they are just different business models for digital platforms to present consumers with on-demand access to our full catalogs of music for their enjoyment.

[REDACTED]

[REDACTED]

[REDACTED].

73. Our deal with [REDACTED] is a great example.²⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁵ COEX-5.25 [REDACTED]
[REDACTED].

²⁶ See COEX-5.25 at 5. In this agreement, [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷ [REDACTED]

[REDACTED]²⁸

74. Our agreement with [REDACTED]

[REDACTED] is similar.²⁹ For the rights to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁷ While the [REDACTED]

[REDACTED]

²⁸ *Id.* at 7-8.

²⁹ COEX-5.26 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³⁰

75. In addition to the agreements discussed above, there is even more evidence of this fact that, for digital platforms seeking blanket licenses that do not fall under the compulsory license scope, [REDACTED]

[REDACTED], as I discussed in my *Phonorecords III* statement (at ¶¶ 87-91).³¹

76. Pursuant to our blanket license with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁰ See COEX-5.26, Terms and Conditions § 7. [REDACTED]

[REDACTED] See COEX-5.27

COEX-5.28

COEX-5.29

COEX-5.30

³¹ See also COEX-5.31 [REDACTED]

COEX-5.32

³³ As I testified in *Phonorecords III* (Kokakis P3 WDT ¶102),

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁴

ii. Blanket Licenses for Other Digital Services

78. As I testified in *Phonorecords III* (Kokakis P3 WDT ¶¶ 92-93), in situations where the digital service does not need to obtain sound recording licenses —e.g., lyric, sheet music, guitar tablature, or digital karaoke licenses (where the karaoke company records its own masters)—we usually receive far greater than the statutory rate, and that has continued during the period since *Phonorecords III*. Indeed, in many cases, we receive closer to [REDACTED] of revenue.³⁵

iii. Blanket Licenses with Eligible Services in the US

79. Because the statutory rate acts as a ceiling on the rates that we can negotiate, the direct licenses we make for activity covered by Section 115 are usually made [REDACTED]
[REDACTED].³⁶ If the Board were to determine rates that were too high for

³⁴ See COEX-5.34 [REDACTED]
[REDACTED]

³⁵ See, e.g., COEX-5.35 [REDACTED]

COEX-5.33 [REDACTED]

³⁶ [REDACTED]

the market to bear, licensors and licensees could negotiate rates lower than the statutory rates. [REDACTED]

[REDACTED], even with respect to the *Phonorecords III* rates determined by the Board in the Final Determination. Because even while certain Service Participants challenged the *Phonorecords III* rates on appeal and in the subsequent remand, [REDACTED]

[REDACTED]

[REDACTED]. This, to me, further confirms what seems fairly obvious: the Service Participants can easily pay rates greater than the *Phonorecords III* rates, and would if they had to sit across the table and bargain, especially if we all had access to the same information about their businesses and uses of our music.

80. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁷ [REDACTED]

[REDACTED]

[REDACTED]

³⁷ See COEX-5.10 [REDACTED]

[REDACTED] See id. [REDACTED]

[REDACTED].

[REDACTED]

81.

[REDACTED]

38

³⁸ See COEX-5.20 [REDACTED]

82.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁹

83.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

84. Finally, as discussed in my *Phonorecords III* statement (Kokakis P3 WDT

¶ 78), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁹ See COEX-5.22 [REDACTED]

[REDACTED]⁴⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

VII. CONCLUSION

85. In conclusion, and as demonstrated above, music publishers play an irreplaceable role, and invest substantial amounts of money, resources and time, in the creation, promotion, dissemination and protection of the copyrighted musical works that are the product being sold by the Service Participants and other Eligible Services. Without that product, there would be no such services.

86. Interactive streaming services have become the predominant method of music consumption in the United States. These services substitute for and do not promote the sales of phonorecords; instead they have supplanted our other streams of revenue. Their existence has resulted in the almost complete evisceration of other sources of mechanical royalty income, including from physical product and digital downloads.

87. The interactive streaming market is now dominated by giant technology companies who use their streaming services—and UMPG’s copyrighted songs—to serve

⁴⁰ See COEX-5.16. [REDACTED]

[REDACTED]

See *id.*

their own business purposes that usually do not align with ours. They all charge the same \$9.99/month price for their premium on-demand services that pre-existed Spotify’s entry into the market some 10 years ago and that was adopted by Spotify, undoubtedly to compete with the then-existing services. Even when they offer something that has been demonstrated to have a higher value in the marketplace and that they can charge and obtain a higher price for—such as a high-definition music offering—when one tech giant able to use music as bait to drive business elsewhere in its ecosystem instead charges less, the other services, unwilling to risk losing market share, fall into line and instead choose to give it away. This is not about capturing low-willingness-to-pay consumers. It is about competing for the market and “customer lifetime values” for their sprawling ecosystems. Their decisions to massively discount the price of their music services is done for the same reason.

88. The Copyright Owners’ proposed rates and terms, in my view, “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” They are [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

89. While our agreements with Eligible Services for rights that are subject to the compulsory license are not, in my view, appropriate benchmarks for determining the statutory rate under the willing buyer/willing seller rate standard, those agreements

[REDACTED]

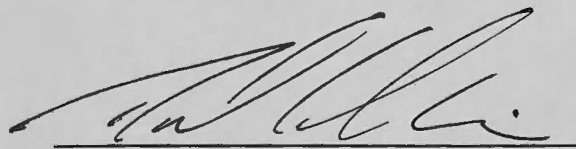
[REDACTED]

[REDACTED]

90. For these reasons, I strongly urge the Board to adopt the rates and terms that the Copyright Owners have proposed.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 13, 2021

A handwritten signature in black ink, appearing to read 'David Kokakis', written over a horizontal line.

David Kokakis

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 21-CRB-0001-PR (2023-2027)

WITNESS STATEMENT OF ANNETTE YOCUM

1. My name is Annette Yocum and I am the Vice President of Finance for Warner Chappell Music, Inc. (“Warner Chappell”).

2. For decades – indeed, for over a century – full-service music publishers, ranging from the smaller, sometimes family-owned businesses, to the major publishers with millions of songs in their catalogues, have played a critical role in supporting the creation of music. They do so by using income they receive from their existing catalogues of music, net of the payments they make to songwriters, co-publishers and other royaltors (known as the “Net Publishers’ Share” or “NPS”) to finance the creation of music by both established songwriters and, perhaps just as importantly, new and unknown songwriters.

3. Both new and unknown songwriters need financial support in order to devote their time and attention to songwriting. Music publishers are able to provide that financial support through the licensing, administration and enforcement of their rights in their existing catalogues. But to do so, music publishers have to maintain their rights in their existing income-producing catalogues and maximize the income produced by those catalogues to continue to generate the income necessary to support both the writers of the future and existing writers. To retain U.S.

rights in existing catalogues or to acquire rights in catalogues of songs that were previously controlled by other publishers, music publishers like Warner Chappell must invest millions of dollars a year to retain or acquire the rights to the songs that enable them to generate the income necessary to continue the creative cycle, a cycle that has continued to produce music generation after generation.

4. Music publishers take on the financial risk that many of the songwriters and composers they sign and to whom they pay advances will never achieve any commercial success. Every year, Warner Chappell pays [REDACTED] both to those who have demonstrated success and also to those with no proven track record. As of [REDACTED]

[REDACTED] These [REDACTED] as Warner Chappell continues to invest in the future of the music industry, even though Warner Chappell will never recoup many of the advances. Yet, unless there are music publishers willing to bet that existing songwriters will continue to write successful songs and that future songwriters, who have yet to write a successful song, will do so in the future, inevitably the public will be deprived of great songs that will never be written (or if written, will never be heard).

5. In addition to investing in the future of music, Warner Chappell and other music publishers also pay for and provide critical human and technological infrastructure that enables songwriters to focus their attention on creating music rather than focus on all of the other tasks involved in marketing, licensing and promoting songs on a world-wide basis. Among other things, music publishers employ people and maintain systems that are responsible for securing copyright protection for songs, tracking exploitation of the songs, collecting income from tens of thousands of sources around the world, processing this data, and issuing royalty statements and payments to

the songwriters or their heirs. Music publishers also employ people whose responsibilities are to protect and enforce the copyrights in the songs against infringers and to defend against infringement claims.

6. As the Judges are aware, unlike recording artists who make money from the distribution of their sound recordings, touring, merchandising and sponsorships, songwriters and music publishers are largely dependent on three sources of income: (1) mechanical rights, (2) public performing rights and (3) synchronization rights or reproduction rights.

7. Income from mechanical rights is comprised of the sale of physical recordings and digital downloads as well as from interactive audio streaming. The sources for public performance income include the performance of musical compositions on terrestrial radio, in bars and restaurants and on interactive and non-interactive streaming services. Synchronization or reproduction income is derived from television programs, commercials and motion pictures, which typically license a specific song; from audiovisual streaming services (such as [REDACTED], which also typically license a specific song or songs for a particular use); and from interactive audiovisual streaming platforms (such as [REDACTED], which license entire catalogues on a blanket basis).

8. While each of these sources of income has changed over time in terms of their relative importance to music publishers and to songwriters – especially as the distribution of music has changed from an ownership model to an on-demand access model – it is the aggregation of all of these sources that provides the revenue necessary for Warner Chappell and other music publishers to continue to invest in songwriters. Moreover, certain forms of exploitation promote other streams of income (similar to how radio airplay or the use of a song in a motion picture

historically promoted sales of that song), and therefore some sources of income have a value that is much higher than the value of income it generates directly.

9. The change to an on-demand access model has made interactive audio streaming our largest source of mechanical income, and it has supplanted, rather than promoted, the sale of physical recordings and digital downloads, [REDACTED]

[REDACTED]. Interactive audio streaming has also become a significant source of public performance income [REDACTED]

[REDACTED] The same on-demand access preference of the public has also produced the rise of interactive audiovisual platforms like those referenced above, an area that has continued to grow, resulting in meaningful increases in synchronization/reproduction income and performance income for Warner Chappell and its songwriters.

10. Warner Chappell's financial records reflect the dramatic shift over the past few years from an ownership model of distribution to an on-demand/access model. The fact that we can negotiate in an open market with interactive audiovisual platforms for synchronization rights provides us with the opportunity to protect and enhance the share of income we receive from such platforms. Just as we were able to successfully negotiate agreements with [REDACTED] for a blanket license of our catalogue for audiovisual interactive streaming, we have successfully entered into license agreements with new entrants in this space, including [REDACTED]. The fact that these license agreements have been negotiated in an open market without a compulsory licensing requirement does not appear to me to have been an impediment to either the issuance of licenses or to the entry of new players in the marketplace. That is no surprise to me since music publishers and songwriters have an interest in licensing the use of our songs to others.

11. Because we negotiate with audiovisual streaming services in an open market, we can seek to negotiate terms that protect us and our songwriters against business strategies of our licensees that may not be focused on maximizing income. We do not have this same opportunity in our negotiations with interactive audio streaming services. Rather, other than the protections in rates set by the Judges, songwriters and publishers are completely subject to the business strategies of the interactive audio streaming services, which may have goals other than maximizing current revenue.

12. Music publishers and songwriters remain focused on trying to protect, and hopefully enhance, the mechanical and performance income generated by the interactive audio streaming services because they have become such important sources of income. Without some downside protection, a percent of revenue rate structure leaves us at the mercy of business decisions of the interactive audio streaming services over which we have no influence. I am aware that the interactive audio streaming services contend that all of their various plans and programs will increase future revenues and royalties. Based on our reports from the Mechanical Licensing Collective (the “MLC”), these services have in fact driven down their average revenue per user (“ARPU”) far below the stated subscription rate (which I believe is essentially the same \$9.99/month rate for all services that first went into effect before 2008). Whether or not the services are correct, the supposed beneficiaries of future growth in revenue and royalties will not be the current songwriters since their songs are earning less income now due to the various business strategies of the streaming services.

13. In addition to explaining music publishers sources of revenue, I will also discuss the services that Warner Chappell and other music publishers provide to songwriters that songwriters cannot effectively provide themselves. For example, Warner Chappell uses its NPS

to pay advances to new and established songwriters; to pay the costs of marketing, promoting and licensing songs on a worldwide basis; to track exploitation and ensure that thousands of licensees properly pay licensing fees; to report to songwriters and pay them their share of the licensing income; and to protect the copyrights in its catalogue and defend against claims of infringement.

14. Contrary to assertions that I understand have been made by the streaming services, pursuant to our agreements with our songwriters, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15. Finally, I will provide a comprehensive analysis of the sources of revenue that Warner Chappell shared with its songwriters from 2016 through 2020, including which revenue sources have increased or decreased (and by how much), and I will compare the current interactive audio streaming income received by Warner Chappell and its songwriters with the mechanical income Warner Chappell and its songwriters received in 2009 before interactive audio streaming effectively destroyed the market for physical recordings and digital downloads.

I. Professional Background

16. I have a Bachelor's degree in Finance from Western Michigan University and a Master of Science degree in Accountancy from Walsh College. I am also a certified public accountant.

17. As Vice President of Finance for Warner Chappell, I am responsible for several areas of the financial affairs of the company, including budgeting, forecasting, financial analysis and reporting, accounting and reviewing music publishing deals with our songwriters. I report to David Woirhaye, Warner Chappell's Chief Financial Officer.

II. Warner Chappell

18. Warner Chappell is one of the largest music publishing companies in the world. Warner Chappell's catalogue includes songs written by iconic writers such as James Brown, Cab Calloway, Harry Chapin, Cole Porter, K.D. Lang, Kendrick Lamar, Led Zeppelin, Kacey Musgraves, Katy Perry, Quincy Jones, Nate Ruess, Jule Styne, Vance Joy, Van Morrison, Barry White and 21 Pilots. Warner Chappell owns and/or administers approximately [REDACTED] musical compositions written by [REDACTED] of songwriters.

III. The Substantial Costs Incurred by Warner Chappell to Discover New Songwriters and Administer the Songs of Its Current Songwriters

19. Warner Chappell employs hundreds of people who provide critical services on behalf of songwriters – many of which also benefit our licensees – that enable the smooth functioning of the music business.

20. As I discussed above and in my witness statement in *Phonorecords III* – a copy of which is attached hereto as **COEX-6.1** and is incorporated by reference herein – a critical service provided by music publishers is the investment we make to discover and develop new songwriters. The employees in Warner Chappell's Artist and Repertoire (A&R) department are focused on discovering new songwriters and then helping them develop their talents. Warner Chappell currently employs approximately [REDACTED] in the U.S. alone who are dedicated to discovering and developing new and diverse songwriters. I will detail the costs associated with our A&R department below.

21. After discovering a new and talented songwriter, a music publisher enters into a publishing agreement with the songwriter. While publishing agreements from decades ago often provided songwriters and publishers with roughly equal shares of the income generated by a song,

modern publishing agreements are [REDACTED]
[REDACTED] or more of the income attributable to that songwriter's percentage share of a song, or an administration deal, [REDACTED] of the income attributable to that songwriter's percentage share of a song.

22. At the same time that the [REDACTED], two other changes in the music publishing business have impacted Warner Chappell's income and its approach to signing songwriters. First, songwriting has become a far more "collaborative process," especially in the hip hop music and pop music genres. If one were to examine Warner Chappell's catalogue (or the catalogues of other publishers consisting of songs that were written decades ago), one would see that, historically, songwriters frequently wrote alone or with one or two other collaborators (such as Cole Porter or Harry Chapin, who commonly wrote both lyrics and music, and Jule Styne who collaborated with Sammy Cahn). A music publisher could therefore obtain either complete control or a significant degree of control over the exploitation of the songs written by its songwriters along with a substantial publisher or co-publisher share of the income generated by those songs.

23. Currently, there are many more "collaborators" obtaining a percentage share of a song, including producers and others involved in the process of recording a song. As a result, Warner Chappell may only receive a small fractional share of a song by one of its songwriters, depending on how many "collaborators" are provided with songwriting credit. Warner Chappell [REDACTED] in order to meet the demands for new songs and collaboration, and [REDACTED]

[REDACTED]

[REDACTED]

24. The second change that has also impacted publishing income is the disaggregation of albums that began with digital downloads and which has been exacerbated by interactive audio streaming. Interactive audio streaming business is based on a business model focused on “hit singles,” both for current releases and catalogue songs. It is not an album-based business model. Whereas the sale of physical albums and digitally downloaded albums provides mechanical income for every writer of a track on a successful album (regardless of whether the track was released as a single), interactive audio streaming only provides mechanical and performance income for tracks that are streamed and the tracks that are streamed most frequently are usually songs from new albums that are specifically marketed as singles (or are established “hit” singles of the past).

25. Consequently, the financial risks assumed by publishers have increased because even a writer whose song is recorded by a successful artist may not generate much income if the song is not released as a single, or if it is but the single is not successful. As shown below, our mechanical income reflects the fact that hit singles that are streamed on interactive audio streaming services do not promote the sale of albums, and hence, do not produce meaningful mechanical income for other tracks contained on the same album. At the same time, the NPS share of interactive audio streaming income [REDACTED], as shown below. Further, when one includes the songwriter share of performance income that is paid directly to songwriters by their Performing Rights Organizations (“PRO”), [REDACTED]

[REDACTED] Where we

have purchased a catalogue, including the songwriter’s share, Warner Chappell will collect a

higher percentage of income (although the higher percentage would be attributable to the songwriter share we have acquired), [REDACTED]

[REDACTED].

26. In short, based on Warner Chappell's financial records, while overall publishing income has grown over the past few years, songwriters and music publishers have become more dependent on the income produced by "hit" singles, both current and catalogue, that are streamed on audio and audiovisual interactive streaming services. Merely having a song or multiple songs included on an album – even a successful album – no longer provides assurance that a songwriter and music publisher will earn substantial income from that song. [REDACTED]

[REDACTED]

27. In order to maintain the financial capability to discover and sign new songwriters, Warner Chappell must also retain its existing songwriters and/or acquire rights from songwriters previously signed to other publishers. [REDACTED]

[REDACTED]

[REDACTED].

28. Warner Chappell has no alternative but to continue to search for great songwriters, pay increased advances, invest in acquiring song catalogues, and maintain its relationships with established songwriters if it is to continue supporting the creation of songs. The business model of music publishers is to use present income from their catalogues to support the future creation of music. Warner Chappell cannot rely solely on its established songwriters and existing catalogue. It is the successful writers of the future who, in turn, will provide some of the economic wherewithal necessary to continue the search for the succeeding generations of songwriters. Further, songwriters need the advances that music publishers provide to pay their day-to-day

expenses, including professional bills, management commissions, equipment costs, transportation, taxes, and general living expenses, all of which allows the songwriter to focus on songwriting.

29. In paying advances to songwriters, Warner Chappell assumes the risk that the advance will never be fully recouped. As I stated in my witness statement in *Phonorecords III* (COEX-6.1), in 2016, Warner Chappell had accumulated advances of over [REDACTED]
[REDACTED]
[REDACTED]. By 2020, Warner Chappell had accumulated advances of over [REDACTED]
[REDACTED]
[REDACTED]). The substantial increases in the accumulated advances, the reserves taken against advances, and the net royalty advance amounts are documented in lines 361 to 363 of COEX-6.2 (the Comparative Balance Sheet section).

30. COEX-6.2 also shows the dramatic increase, not only in cumulative outstanding advance payments and the reserves taken against those advance payments, but in the risks associated with advances. As shown on line 498, the annual [REDACTED]
[REDACTED]
[REDACTED] (line 499). And net of recoupment and write-offs, the total movement in the net annual advance payments (as a cash flow item) [REDACTED]
[REDACTED]

31. The advances paid to writers are far from the only costs Warner Chappell incurs in entering into agreements with new and existing songwriters. Warner Chappell also has substantial overhead costs.

32. Warner Chappell employs approximately [REDACTED] encompassing many divisions of the company, including business and legal affairs, licensing (including digital licensing, synchronization licensing and mechanical licensing), copyright and tracking, marketing and finance. (See **COEX-6.2**, lines 327 to 345.)

33. Warner Chappell's legal and business affairs department negotiates and drafts numerous agreements, including songwriter agreements, renewals, extensions, acquisitions, and license agreements. They also manage and supervise pre-litigation claims and litigations related to songs in Warner Chappell's catalogue.

34. The overhead costs for the services rendered by the A&R, finance, and business and legal affairs departments are substantial and constitute a significant portion of Warner Chappell's total overhead costs. Warner Chappell's total overhead costs [REDACTED]

[REDACTED] (See **COEX-6.3**, line 74.) The overhead costs associated with the A&R department [REDACTED]

[REDACTED] (See **COEX-6.3**, line 59.) The overhead costs of the legal and business affairs department (which includes the digital licensing department) were approximately [REDACTED]

[REDACTED]¹ The annual overhead costs of the finance department [REDACTED]

35. Warner Chappell also has an Administration Division that includes a number of departments, including mechanical licensing (although most mechanical licensing is now done through the MLC) and audit. Warner Chappell's licensing department handles synchronization licensing whereas the digital department does all digital licensing that does not go through the MLC or the PROs. The royalties department, which I discuss below, and the licensing department, both perform critical services for our songwriters and, as reflected on lines 327 through 344, Warner Chappell's headcount year-to-year of employees in royalties and licensing is substantial.

36. Warner Chappell's copyright department ensures that the songs in our catalogue are properly protected and registered with the U.S. Copyright Office, with one of the PROs (most commonly ASCAP or BMI in the U.S.), with the MLC and other collective rights management organizations throughout the world, and licensed to affiliated or unaffiliated foreign subpublishers for exploitation abroad. The copyright department also engages in research activity, especially with older catalogues. In the U.S. alone, [REDACTED]

[REDACTED] (See COEX-6.2, lines 334, 336.)

37. Of course, one of the most important services provided by a music publisher is the processing of royalties that are received from the thousands of users of songs and the distribution of royalty statements and payments to songwriters. Warner Chappell's royalties department and

¹ [REDACTED]

client services department employ approximately [REDACTED] who process royalties, create and review royalty statements, and handle writer inquiries. (See **COEX-6.2**, line 335.) The business and legal affairs department, in addition to its other functions discussed above, also assists the Administration Division with audits.

38. Warner Chappell has a [REDACTED] (see **COEX-6.2**, line 340), which consists of approximately [REDACTED]. The employees in this department provide services such as [REDACTED].

39. Finally, Warner Chappell's Executive Department oversees all of the other departments and services I have described.

40. **COEX-6.3** shows the overhead costs associated with the services provided by Warner Chappell including licensing, copyright, tracking and royalties. Further, there are substantial overhead costs (which have risen from [REDACTED] [REDACTED]) that are not specifically associated with any individual department, but which are costs Warner Chappell nonetheless must bear to support all of the services it provides on behalf of songwriters. These costs are centralized in the U.S. and in the U.K. but are allocated throughout the world, including the U.S., as the services provided are worldwide. (See **COEX-6.2**, lines 294, 314; **COEX-6.3**, line 73.)

41. It is important to emphasize that these overhead costs represent only a small fraction of Warner Chappell's costs. As reflected on lines 245 through 274 of **COEX-6.2**, once all of our costs are subtracted from our NPS, including overhead, [REDACTED]

42. In my view, given the costs involved and the systems required, the services Warner Chappell provides to songwriters cannot reasonably be performed by the songwriters themselves, who do not have the human and technological resources that music publishers have. Music publishers use the income received from the songs in their catalogues to invest in both the songs of the future and the administration of the songs of the present, and provide the necessary services that enable the music industry to function efficiently.

43. The NPS percentages for each category of Warner Chappell's income from 2016 to 2020 are shown on **COEX-6.2**. Additionally, attached as **COEX-6.4** is a schedule showing the percentage of streaming income received by Warner Chappell that it paid to songwriters, on a quarterly basis, from March 2016 through March 2021. It shows that Warner Chappell has consistently paid songwriters percentages ranging from [REDACTED]

[REDACTED] These percentages do not include the songwriters' share of performance income that is paid directly to songwriters. If that were included here, Warner Chappell's [REDACTED]

44. In 2016, Warner Chappell's share of streaming mechanical income was approximately [REDACTED]. (See **COEX-6.2**, line 134.) By 2017, it dropped to the [REDACTED] and has remained there.² With respect to the publishers' share of digital performance income, the royalties paid to songwriters and co-publishers and the NPS reflected (see **COEX-6.2**, lines 137, 142 and 145) are not merely interactive audio streaming performance income but consist

² Line 134 includes foreign mechanical income that was paid into the U.S. and royalties paid on that income. If one only includes domestic mechanical income and the royalties paid on that income (lines 125 and 130), the [REDACTED]

of other forms of streaming performance income. In addition, [REDACTED]

[REDACTED]. If one included the writer's share of performance income as part of total income, [REDACTED]

45. Warner Chappell uses its NPS to pay for the creation of new music and the costs necessary to maintain the human and technological infrastructure to support the songwriting business. I am not aware of the streaming services providing any such services that are so fundamental to the continuing creation of music and the operation of the music business.

IV. The Sources and Amounts of Songwriter and Publisher Revenues

A. *The Increase in Digital Streaming Activity*

46. As I stated in my previous witness statement in *Phonorecords III* (COEX-6.1), in the five-year period leading up to that proceeding, the domestic mechanical income Warner Chappell received from the sale of physical albums and digital downloads [REDACTED]

[REDACTED]. Since that time, as shown on lines 22 and 101 of COEX-6.2, our domestic mechanical income from downloads and physical recordings [REDACTED]

[REDACTED]. Domestic mechanical income from downloads [REDACTED]

[REDACTED]. Domestic mechanical income from physical recordings [REDACTED]

[REDACTED]³ When added to the approximately [REDACTED]

³ [REDACTED]

(shown on line 113), total non-streaming mechanical income [REDACTED]

47. During this same time period, Warner Chappell's domestic mechanical income from interactive audio streaming services increased from [REDACTED]

[REDACTED] (See COEX-6.2, line 125.)⁴ Thus, the [REDACTED] during the same period of time [REDACTED]

48. [REDACTED]

[REDACTED] In 2009, the mechanical income from Warner Chappell and its songwriters from the sale of physical records, digital downloads, and mobile devices totaled approximately [REDACTED]. (See COEX-6.5.)⁵ By 2020, that amount dropped to only [REDACTED]. If we exclude the pending and unmatched mechanical payment we received in

⁴ Warner Chappell's mechanical income from interactive audio streaming, on a net basis, [REDACTED]. Because of the appeal by the Services, [REDACTED]. Once the appeal was decided and the rates reverted to *Phonorecords II* rates, [REDACTED]

⁵ As shown on COEX-6.5, in [REDACTED] most of which was digital synch income from [REDACTED], and a small portion came from [REDACTED]. In that year, we also received a payment from the resolution of a [REDACTED]

2009, [REDACTED]
[REDACTED].

49. The growth in [REDACTED]
[REDACTED]
[REDACTED] as interactive audio streaming
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶

50. The financial data discussed above demonstrates that interactive audio streaming substitutes for, rather than promotes, the sale of physical recordings and digital downloads. Therefore, protecting and enhancing this source of income is very important to the sustainability of the music industry, and indeed, to the streaming industry.

51. Mechanical income is only one part of the income generated from interactive audio streaming. Warner Chappell and its songwriters also receive the publishers' share of performance income. While the data shows that the publishers' share of performance income from interactive audio streaming services [REDACTED], the performance income from other [REDACTED]

⁶ Even if one deducted the totality of the [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] suggesting that interactive audio streaming is not promoting other revenue streams but is instead substituting for other performance income.

52. Attached hereto as **COEX-6.6** is a schedule that reflects the publishers' share of performance income from all sources from 2016 through 2020, for each period in which the income was earned (regardless of whether payment was made to Warner Chappell in a subsequent period), including streaming activity from digital streaming sources whether paid directly pursuant to direct agreements with Warner Chappell or indirectly via ASCAP and BMI. As shown on **COEX-6.6**, the total publishers' share of performance income [REDACTED]

[REDACTED]

[REDACTED]

53. For the 2016 period, the performance income Warner Chappell and its songwriters earned for the publishers' share of performance income from digital services, both directly and indirectly from ASCAP and BMI, including from satellite radio [REDACTED]

[REDACTED] Satellite radio alone paid [REDACTED]

[REDACTED]

[REDACTED]. From the interactive audio streaming services [REDACTED]

[REDACTED] Warner Chappell and its songwriters [REDACTED]

[REDACTED] (See **COEX-6.6**.)

⁷ Because **COEX-6.6** only reflects three quarters of 2020, for purposes of comparison, I compared the 2016 performance earnings with the 2019 performance earnings. **COEX-6.6** does not include performance income paid by SESAC or GMR, but the amount of performance income from those sources is very small.

54. By the 2019 period, the publishers' share of performance income Warner Chappell and its songwriters earned from digital services, including satellite radio, [REDACTED]

[REDACTED] Satellite radio [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

55. As I noted in Paragraphs 48 and 49 above, between 2009 and 2020, [REDACTED]
[REDACTED]
[REDACTED] Thus, even if one includes the interactive audio streaming performance income paid by the services in this proceeding for the 2019 period [REDACTED] and adds to it the total mechanical interactive audio streaming income received by Warner Chappell and its songwriters in 2020 [REDACTED] [REDACTED] and adds to that the mechanical income from the sale of phonograph recordings and digital downloads in 2020 [REDACTED] it is still approximately [REDACTED] than the mechanical income that Warner Chappell and its writers received in 2009, as interactive audio streaming substituted for and replaced the sale of physical recordings and digital downloads, demonstrating

that interactive audio streaming acts as a substitute and replacement for the sale of physical recordings and digital downloads.⁸

56. One could examine only the total streaming income received by Warner Chappell and its songwriters by adding the total mechanical income from interactive audio streaming to the performance income paid by the services (including the songwriters' share of performance income paid directly through the PROs) but not including the mechanical income received from the sale of physical records and digital downloads. That analysis demonstrates that, when one isolates only the income produced by interactive audio streaming, Warner Chappell and its songwriters suffered a loss of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

57. While the performance income from the services in this proceeding increased between 2016 and 2019, other sources of performance income have either diminished or stayed constant.⁹ For example, as reflected on **COEX-6.6**, the performance income from terrestrial radio

[REDACTED]

⁸ One could analyze both mechanical income and the publishers' share of performance income from interactive audio streaming for 2019 [REDACTED], by reviewing the data from lines 22, 101, 113, and 125 of **COEX-6.2**, along with the information from **COEX-6.6**. The [REDACTED] still exceeded the total mechanical income from interactive audio streaming plus the performance income paid by the services by approximately [REDACTED]

⁹ Performance income from interactive audiovisual services, including [REDACTED] and other services that did not exist in 2016, [REDACTED].

[REDACTED]

[REDACTED]. We have also seen a sharp decline in performance income paid by bars, restaurants, and hotels as well as from concert tours. That decline was expected due to the pandemic.

58. Based on the performance income data shown on **COEX-6.6**, we can draw two conclusions. First, the performance income provided by interactive audiovisual services, most of which did not exist in 2016 other than [REDACTED] [REDACTED] reflects the continuing expansion of the shift of the music market from an ownership model to an on-demand access model.

59. Second, [REDACTED] [REDACTED] as the services continue to grow their user base, it does not appear that audio streaming services are causing any increase in other sources of income (and as noted, [REDACTED] [REDACTED] Interactive audio streaming is clearly substituting for and not promoting the sale of physical recordings and digital downloads. [REDACTED]

[REDACTED] on other sources of income as it has been on physical recordings and digital downloads, as shown on **COEX-6.6**, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

60. In short, while income from interactive audio streaming is growing, it is also clearly substituting for, and not promoting, other sources of revenue, including the sale of physical

recordings and digital downloads. [REDACTED]

[REDACTED]

[REDACTED] It has also not promoted growth in other areas or from other sources of performance income.

61. Taking the data from all of the foregoing exhibits, one can assess the relative contribution of interactive audio streaming income to Warner Chappell's net profits in any year. Starting from **COEX-6.2** and using our fiscal year 2019 as an example, Warner Chappell's revenue from U.S. operations in fiscal year 2019 (which ended September 30, 2019) [REDACTED] Warner Chappell's revenue from U.S. interactive audio streaming in fiscal year 2019, inclusive of mechanical income and performance income, [REDACTED] [REDACTED]).¹⁰ In addition, the songwriters received their songwriter share of performance income directly from their PROs in the same amount as the publisher share of performance income [REDACTED]

62. As shown in the exhibits, [REDACTED] [REDACTED] [REDACTED] [REDACTED] based on the publishers' share of performance income shown on **COEX-6.6** and using the NPS share computed from lines 137 and 142 of **COEX-6.2**). The overall NPS for the interactive audio streaming income that Warner Chappell processed (which does not include the songwriter share of performance income) [REDACTED] Including

¹⁰ As I mentioned above, **COEX-6.6** reflects when the performance income was earned, not when it was received. Thus, some of the 2019 income may have been received in 2020.

the songwriters' share [REDACTED]

63. As detailed on COEX-6.2, in fiscal year 2019, [REDACTED]

[REDACTED] as

follows:

[REDACTED]

64. In addition to its overhead costs, in fiscal year 2019, Warner Chappell had product costs, write-offs of A&R expenses, non-recoupable A&R costs, amortization, depreciation, non-operating income, and provisions for taxes, ultimately resulting in [REDACTED] (COEX-6.2, lines 245-276).

65. As the foregoing shows, for Warner Chappell and its songwriters, interactive audio streaming provides a significant portion of overall income. As such, it should be clear that it is critically important to both Warner Chappell and its songwriters to assure that the royalties received from interactive audio streaming services are not subject to reduction due to the business strategies of the services over which we have no control.

I declare under penalty of perjury that the foregoing is true and correct to the best of my understanding.

Dated: New York, New York
October 13, 2021



ANNETTE YOCUM

Proof of Delivery

I hereby certify that on Wednesday, October 20, 2021, I provided a true and correct copy of the Volume III - Written Direct Testimony of Publisher Witnesses to the following:

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